

ALAGAPPA UNIVERSITY

(Accredited with 'A' Grade by NAAC)
Karaikudi 630 003



DIRECTORATE OF DISTANCE EDUCATION

MBA (IB)

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Paper - 4.4

WTO - Constitution and Operations

ALAGAPPA UNIVERSITY

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PAPER - 4.4

WTO-Constitution and Operations

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PAPER - 4.4 : WTO - CONSTITUTION AND OPERATIONS

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REFERENCES

WTO in the Third Millennium : Arun Goyal

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UNIT - 1

WTO FRAME WORK

The setting up of the World Trade Organisation (WTO) was agreed to by 125 countries on April 15, 1994 at a conference in Marrakesh which concluded the strenuous Uruguay round of GATT negotiations after more than seven years of hard bargaining. The new World Trade Organisation which replaces the General Agreement on Tariff and Trade (GATT), had come into effect from January 1, 1995 with the backing of atleast 85 founding members, including India.

Objectives

The Members of Uruguay Round Talks concluded to establish the WTO by recognising that their relations in the field of trade and economic endeavour should be conducted with a view to –

a) raising standards of living,

b) ensuring full employment and a large and steadily growing volume of real income and effective demand,

c) expanding the production of and trade in goods and services,

d) Securing a share in the growth in international trade commensurate with the needs of their economic development.

The members desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements are directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations. The members, therefore, resolved to establish the WTO to develop an integrated, more viable and durable multilateral trading system encompassing the GATT, the results of past trade liberalisation efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.

Establishment

Agreement of establishment the WTO consists of XVI Articles and as per Article I of the Agreement the WTO is established. The WTO was founded on January, 1, 1995, as a successor to the General Agreement on Trade on Tariff (GATT). The chief difference between the two is that while GATT focused primarily on trade in goods, the WTO covers cross-border trade in services, ideas and movement of personnel. The underlying principle of the WTO is to create an international environment that enables the free flow of goods, services and ideas. This will ensure that the most competitive locations internationally provide the goods, services and thus, result in the most efficient use of global resources. The four main WTO guidelines are: (i) Trade without discrimination, (ii) Predictable and growing market access, (iii) Promoting fair competition, and (iv) Encouraging development and economic reform.

Scope

The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes.

1. The agreements and associated legal instruments of the Multilateral Trade Agreements are binding on all Members.

2. The agreements and associated legal instruments of the Plurilaterial Trade Agreements are also part of this Agreement for those Members that have accepted them and are binding on them.

3. The General Agreement on Tariff and Trade, 1994 is legally distinct from the General Agreement on Tariff and Trade dated 30 October 1947.

Functions

The WTO has the following five specific functions.

1. The WTO shall facilitate the implementation, administration and operation and further the objectives of the Multilateral Trade Agreements

and shall also provide the framework for the implementation, administration and operation of plurilateral trade agreements.

2. The WTO shall provide the forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the Agreements.

3. The WTO shall administer the 'Understanding on Rules and Procedures Governing the settlement of Disputes.

4. The WTO shall administer the 'Trade Review Mechanism.

5. With a view to achieving greater coherence in global economic policy making, the WTO shall cooperate, as appropriate, with the IMF and IBRD and its affiliated agencies.

The General Council will serve four main functions

(a). To supervise on a regular basis the operations of the revised agreements and ministerial declarations relating to (a) goods, *(b)* services and (c) TRIPs;

(b). to act as a Dispute Settlement Body;

(c). to serve as a Trade Review Mechanism; and

(d). to establish Goods Council, Services Council and TRIPs Council, as subsidiary bodies.

The WTO is a more powerful body with enlarged functions than the GATT and is envisaged to play a major role in the world economic affairs. Following are the differences between GATT and WTO.

GATT	WTO
GATT was ad hoc and provisional	WTO and its agreements are permanent

GATT had contracting parties	WTO has members
GATT focused primarily on Trade in goods	WTO covers Cross border Trade in Services and movement of personnel.
GATT system allowed existing domestic legislation to continue even if it violated a GATT agreement	WTO does not permit this
GATT was less powerful, dispute settlement system was slow and less efficient, its ruling could be easily blocked.	WTO is more powerful than GATT, dispute settlement mechanism is faster and more efficient, very difficult to block the rulings.

Structure

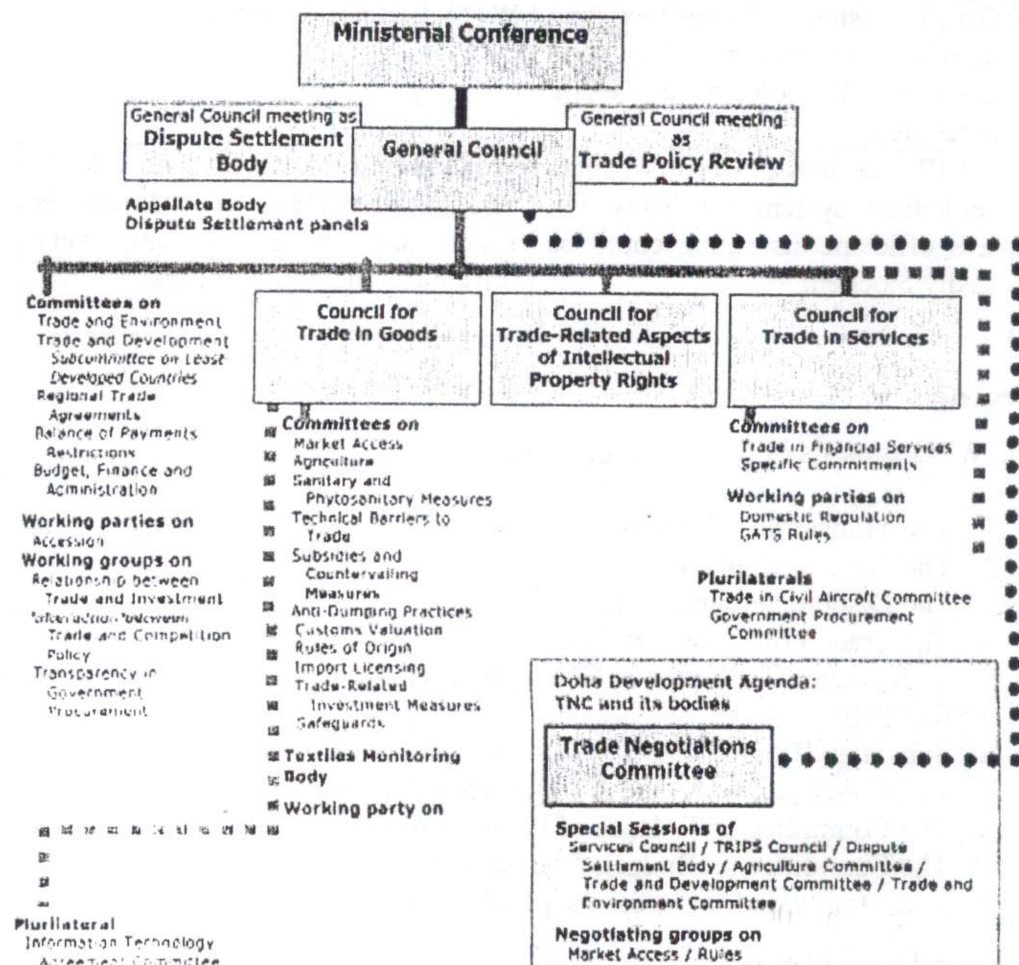
The WTO consists of the following bodies :

1. The Ministerial Conference
2. The General Council
3. The Dispute Settlement Body
4. The Trade Policy Review Body
5. The Council for Trade in Goods, Council for Trade in Services, Council for TRIPs
6. Subsidiary Bodies
7. The Committee on Trade and Development
   The Committee on Balance of Payment & Restriction
   The Committee on Budget, finance & Administration
8. Bodies provided for under the plurilateral Trade Agreements

The Following Exhibit depicts the basic structure of WTO along with their respective activities.

FIGURE - 1

STRUCTURE OF WTO



Key

Reporting to General Council (or a subsidiary)

Reporting to Dispute Settlement Body

Plurilateral committees inform the General Council or Goods Council of their activities, although these agreements are not signed by all WTO members

Trade Negotiations Committee reports to General Council

The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body

Ministerial Conference

The topmost decision making body of WTO is the Ministerial Conference, which has to meet every two years. It brings together all member countries to take decisions on all matters under any of the multilateral agreements. The conferences held so far are:

- Singapore - Dec 9-13,1996
- Geneva - May 18-20,1998
- Seattle - Nov 30-Dec 13, 1999
- Doha-November 9-14, 2001
- Cancun, Maxico – September 10 – 14, 2003
- Geneva, June 2006

Doha Ministerial Declaration has set different time limits for negotiations subject the deadline January 1, 2005 and has asked the member governments to undertake negotiations on specific issued and enter into successive rounds of negotiations to progressively liberalize trade in services. Accordingly, the services negotiations started officially in early 2000 under the Council for Trade in Services. In March 2001, the Services Council fulfilled a key element in the negotiating mandate by establishing the negotiating guidelines and procedures. Doha Declaration fixed the deadline on request for market access by June 30, 2002 and initial offers of market access by March 31, 2003. The Doha Declaration endorses the work already done, reaffirms the negotiating guidelines and procedures, and establishes some key elements of the timetable including, most importantly, the deadline for the conclusion of the negotiations as part of a single undertaking on January 1, 2005.

Since March 2001, negotiations on services have moved into a more intensive phase of discussing specific proposals. So far, around 100 proposals have been submitted by 50 members covering a wide range of service sectors, the movements of natural persons and other issues such as the treatment of small and medium sized enterprises, transparency of regulations, classification issues and MFN exemptions. Negotiations, which started since march 2001 include

work on GATS rules (Articles X.XIII and XV), work on domestic regulations (Article VI.4), review and negotiations concerning MFN exemptions (Annex on Article II), treatment of autonomous liberalization (Article XIX), assessment of trade in services (Article XIX) and review of air transport services (Annex on Air Transport Services).

We all are aware that Cancun Ministerial Meeting failed because of the inflexible attitude of the European Union on the question of reducing, agricultural subsidies and inclusion of Singapore Issues into the main agenda of the WTO. Negotiations on services maintained relatively low profile at Cancun because most of the attention was directed towards agricultural and Singapore Issues. In services negotiations, member countries follow sector-specific approach through "offers" and "requests". Draft Cancun Ministerial Text (Second revision) has given emphasis on better market access in all areas of services by the member countries within the stipulated date. Ministerial Text has suggested that due importance should be given to the quality of offers, particularly in sectors and modes of supply of export interest to the developing countries. This suggestion is very much in tune with the developing countries' requests to the liberalization of supply of services under mode 4, i.e. movement of natural persons in which they have comparative advantage.

Cancun Ministerial Text is also committed to intensify the conclusion of the entire negotiations on rule-making under GATS Articles VI:4, X, XIII, and XV in accordance with their respective mandates and deadlines, nothing the deadline on March 15, 2004 for emergency safeguard measures. The Special Session of the Council for Trade in Services was to review the progress of these negotiations by March 31, 2004. While emphasizing the special need of developing countries in supply of mode 4 services, the Ministerial Text has suggested that negotiations should aim at achieving progressively higher level of liberalization with no a priori exclusion of any services sector or mode of supply to their export interest. Ministerial Text also honours the right of the Members to regulate and to introduce new regulations in pursuance of national objectives. The Draft Ministerial Text has also welcomed the "Special Treatment for Least-Developed Country Members" in the negotiations on trade in services and look forward to their implementation by all participants.

In spite of honest and sincere efforts of the GATS Council to liberalize trade in services and the modes of supply, it has not yielded its desired results. Though some countries have presented "offer and request" lists highlighting the areas of service sectors, which they want to liberalize, export interests of the developing countries are still kept in the cold storage. A number of developing countries feel that over the periods of negotiations the emphasis has been given to market-access including requests and offers process without enough attention to overall rule making issues such as assessment and subsidies. Many developing countries in their initial market opening offers have given little, especially on opening up their countries to cheap labour from other countries, i.e. mode 4 supply (movement of natural persons), which is of vital interest to developing countries. Though there is no substantial outcome of negotiation on services as yet, it seems from the mode of negotiations and nature of offer and request list that regulatory objectives are going to be at the centre of negotiation because they speak more about sovereignty than any other issues. There may be regulatory approaches being developed outside the WTO right now. That reveals a risk of viewing the WTO as a closed system.

The Fifth Ministerial Conference of the 146 member (plus further two members – Cambodia and Nepal – which are now being acceded) World Trade Organisation held in the beautiful city of Mexico at Cancun from 10-14 September, 2003 was supposed to take stock of the progress in the Doha Development Agenda negotiations and set the tone for the future events. The Mexican resort of Cancun came to end amid confusion and disappointment among the developing and least developed countries and anger for the developed world. This has resulted in the erosion of faith in the WTO and more so in "globalisation" for stimulating development in India.

The Cancun Ministerial turned out to be a ministerial of alliances of the developing world – they not only maintained their alliances; formed newer ones and expanded the existing. The G-17 (group of developing countries on agriculture when it was first formed) became G-21 (when it had gone to Cancun) and now G-22, which includes India, China, Brazil and South Africa had taken the fight against the trade distorting subsidies of the developed world to the EU's doorstep. Taking a cue from G-21/22, a new 16 – member alliance (actually

representing upto 70 countries in Asia, Africa and Latin America) was formed on opposing negotiations on the four Singapore issues. Some important members of the group included India, China, Malaysia, Bangladesh Jamaica and other developing nations.

The Union Commerce Minister, Mr. Arun Jaitley, who led the Indian delegation, lost no time in seizing the opportunity to emerge as one of the few who could stand up and be counted for espousing the cause of development, in general, and of farmers, in particular. On the Singapore issues of investment, competition, transparency in government procurement and trade facilitation, Mr Jaitley has thrown enough hints during his interaction with mediapersons both in India and there that New Delhi is willing to show some flexibility on trade facilitation and government procurement, provided there is some satisfactory outcome on implementation issues.

At the talks, there was widespread recognition that the Agreement on Agriculture formed the main item on the agenda. In a way, the dozen or so new items that appeared on the radar screen sort of got pushed back to bring agriculture back into centrestage. The Cancun ministerial witnessed the decline in the dominance of the US and the European Union and new found solidarity among developing countries on key issues like agriculture and investment. The main focus in the discussions on agriculture was the pattern of richer countries paying massive subsidies to their farmers.

The WTO was designed to correct the skews of unfairness emanating out of the multi-lateral trade rules by creating a rules based predictable and democratic environment, but, developed nations have, till now, worked out deals in their favour in the garb of providing petty aids to the poor world. The US and the European Union now need to realize the WTO can move forward only by consensus and Cancun has made it very clear.

Sharad Joshi in his article published in Business Line, September 17, 2003 pointed out that developing countries might have scored a victory as, by sheer strength of their numbers, they succeeded in making Cancun a futile exercise. But whatever the perception of self-interest of various countries, ultimately, history will push them towards systems that are open and transparent.

The only group that seems to have gained some kind of victory is the anti - globalisation lobby. Due to the failure of the Cancun ministerial, the debates surrounding the benefits of globalisation have also resurfaced. It has been pointed out that "The international agreements, particularly under the WTO, have not helped the developing countries as was professed at the time of establishment of the WTO" (Vyas, 2002).

One thing that emerges is that the Doha round of negotiations will certainly get postponed, and the chances of its concluding by 2005, at the sixth ministerial in Hong Kong are remote. Though the ministerial was a victory for the developing world, the positions of certain countries and members are still not clear.

There is no doubt that that extra sacrifice will now not be forthcoming from the developed economies not merely" because (as past experience has proved abundantly) it is simply not in the nature of the rich to hurt their domestic industry and farm lobbies beyond a point in normal circumstances but because their hackles have now been raised by the success of the developing countries at Cancun, where, essentially, the economic underdogs have become bold enough to challenge the critical domestic support parameters of various kinds on which the rich are continuing to feed in an effort to maintain their economic pre-eminence in the modern world.

This is in fact the basic message which has been sent to the world at large by people like the WTO Director-General, Mr Supachai Panitchpakdi, who wrote in a recent (post-Cancun) article in the *International Herald Tri- bune* that "those that will suffer the most for their inability to compromise are the poorest countries among us", the argument being that "a more open and equitable trading system would provide them with an important tool in alleviating poverty and raising their levels of economic development".

The clear inference here is that the poor should have made more compromises in the interests of "a more open and equitable trading system", which does not make much sense because, on grounds of equity not to speak of the Doha Development Agenda itself in the implementation of which Cancun

was an important step, it is the rich which should have taken the lead on subjects like reduction in domestic support and export subsidies, on the one hand, and going slow on the inclusion of the "Singapore issues" on the negotiating agenda, on the other.

The European Union opined that the failure of the Cancun Ministerial of the WTO has "short-changed the aspirations of the developing world in particular and the momentum that was generated prior to the Cancun has certainly been lost". The Ambassador-Head of Delegation of the European Commission in India, Mr Michel Caillouet, said that liberalising trade within the South was more important an issue for sustained growth in the developing world, as non-agricultural tariffs faced by even the East Asian countries in South Asia were much higher than what they faced in the developed world. He further pointed out that European Union went considerable distance from its negotiating stance to meet the concerns of its trading partners both in the developing and the developed world by relaxing stance on investment, competition, trade facilitation and public procurement. But the kind of flexibility of EU showed to make the Doha Development agenda a success has not been reciprocated by any other member of the WTO.

India went to Cancun with a preconceived strategy, a negative tactic to begin with. Cancun's failure is nobody's gain. The developing and least developed countries will suffer the most. Developed nations will enter into bilateral pacts and strike hard bargains in their favour. India, on the threshold of sustained economic growth, will be affected by the stalemate at Cancun. Also, it is neither a part of any significant trade bloc that governs bilateral trade or party to multilateral agreements. The latter, though slow in finalisation, opens up the avenues to large volumes of business. The accruing benefits can be leveraged by 'more' developing countries such as India.

The growth economies of the world have based their economic model based on reforms. Consider a situation where India's exports are blocked or made difficult by developed countries through Quantitative Restrictions (QRs) and other non-tariff barriers and, in retaliation, we block imports. Who is the ultimate loser? India requires foreign technology to keep its core engineering, manufacturing and research programmes going, and to develop its large domestic market. Further B.S. Rathor in his article appeared in Business Line

dated October 17, 2003, "Cancun failure is nobody's gain" pointed out that Compliance with WTO norms on tariff and reforms has only increased India's competitiveness. Ten years back, who would have expected the Tatas to export a made-in-India car to the UK and Europe? And that the company would make large investments in an integrated steel plant to supply skin panels to global auto OEMs. Did anyone forecast that TVS Motor would buy out Suzuki's equity? With reforms, India is emerging as a potential exporter in the auto segment. These gains will be marginalised if some of the global markets are shut on us.

The biggest achievement of Cancun meet has been in bringing together the G-21 and other developing countries in their commitment in reduction in the export subsidies of the West, though unsuccessfully. In the past the developed nations have always been successful in breaking up of the alliances formed by the developing countries by promising them financial aid or by threatening them with stoppage of future financial benefits. Infact, the developing nations bloc was successful in curtailing the developed Bloc's demands on them on fresh cuts in import duties under the non-agricultural market access.

Even though the developing countries benefited at the Cancun summit by forming regional groups against the North Bloc countries, such regionalism is not a good practice while aiming for further trade liberalisation. The regional trade arrangements may yield quick short-term gains but would weaken the international multilateralism. Further, groups involving weak economies and stronger ones do not guarantee a level playing field for the former even within the trading area.

But who has lost in the whole process? Obviously, the developing and the least developed countries. The developed world continues to sit pretty. There is no doubt that some reduction of farm subsidies in rich countries and lowering of tariffs on agricultural imports would pave the way towards a more fair and equitable trade regime. But, for that, the developing countries need to re-think their strategy and not hold on to such stubborn positions as they did at Cancun.

Where India Stands after Cancun?

Unlike agriculture, TRIPS and Singapore Issues, services sector is not a priority area of negotiations at the movement, neither it is very controversial which requires intense negations in multilateral forum to conclude any agreement. Rather, all ministerial meetings lay emphasis on bilateral discussions between the countries with their "offers and requests" list consistent with their national objectives. Unlike trade in goods,, developing countries have comparative advantage in providing skill-intensive services to developed countries except commercial services. In many developing countries including India, balance of trade in services tilts in favour of them. India is well positioned in health, education, software, construction and engineering, legal and accounting services.

Draft Cancun Ministerial Text (Second revision) hardly focuses anything on services. What it provides is the tentative schedules of negotiations and date of conclusion. In the Draft Text, emphasis is laid down on the "requests and offers" among the members and they have been told to conclude it within the stipulated time period of March 15,2004 because of its review meeting on March 31, 2004. It has mentioned about the importance of developing countries in mode 4 supply of service and has urged all the member countries to fully engage with the issue. Draft Text stresses the importance of full engagement by all participants, inter alia through the continuous exchange of requests and offers with a view to concluding the negotiations by the stipulated date.

No doubt, India has emerged as a leader at Cancun and would be expected to play a major role in shaping the world trading system in the coming years by providing leadership to developing countries. However, the conclusion of the Doha Development Agenda, which includes special and differential treatment to developing countries, aid for trade, and quid pro quo approaches, seems difficult to be completed before the scheduled time of end of the year 2004. To pave the way for the new roadmap of trade liberalisation slated to begin in 2005, the agreement on the Doha Development Agenda has got to be completed by the end of 2004. Besides phasing out subsidies, there is a need for

making efforts to improve market access by abolishing quotas, safeguards, countervailing and antidumping duties.

Judging by the reports from Cancun it would appear that there is a general disappointment, both among the participants and the public, at the breakdown of the multilateral trade talks. As this means a further setback to the long-cherished dream of making the world a single free market with each country giving the other the treatment as given to the Most Favoured Nations and treating all goods and services as being on par with domestic products once they enter the national frontiers.

Current Developments

Doha Round in a Crisis

After the failure of the mini-ministerial in Geneva, it is difficult not to endorse the view of WTO director general Pascal Lamy that the Doha Development Round is facing a crisis. Despite this grim picture, it is much too early to write off the Round itself. In trade negotiations the prospect of complete failure is often the prod needed for members to begin offering concessions that matter. In fact, the ministers were careful to set out a course of action so that the failure of the Geneva meet was not seen as the failure of the larger round of trade negotiations. By authorising director general Lamy to undertake wide-ranging consultations they may have even set in motion a process that will soon provide the much-needed breakthrough.

While the world will monitor Mr Lamy's progress, India has reason to ponder over the change in the mechanics of the negotiations. Successful WTO negotiations invariably boil down to a small group of countries that can negotiate effectively. This only works when this group is able take along the larger body of countries outside. In recent negotiations this smaller group has taken the form of the G6, consisting of Australia, Brazil, the EU, India, Japan and the US. But at Geneva there appeared to be some dissatisfaction with this group. Some members asked the G6 to show leadership by reaching a consensus first while others challenged the priorities of the G6 and sought negotiations on a wider set of issues. It will be interesting to see whether Mr Lamy perceives his new role to be one of bringing about a consensus within the G6 or seeking to function through an alternative group of nations. Whatever course the negotiations do

finally take, India's role in the process will depend on whether it works towards a consensus even as it protects its interests and those of other developing countries. Mr Kamal Nath's decision to leave the Geneva meet early may have been designed to be a dramatic gesture against the developed world, but it would certainly not have enhanced India's credentials as a consensus builder.

WTO - Stalemate Continues

The mini ministerial of the WTO held "in Geneva in end June 2006 seems to have confirmed the worst fears that the ongoing Doha Round negotiations have virtually collapsed. The negotiations in the run up to and in Geneva have highlighted the deep differences between the developed and developing countries with no "meeting point in the negotiating space."

Members of the WTO met to reach an agreement on modalities in agriculture and industrial products on the Doha Round negotiations launched in 2001 with an ambitious agenda to expand global trade.

In addition to stalling the proposals to reduce import tariffs and farm support, the failure of the Geneva mini Ministerial also delay ushering in a duty-free, quota-free import regimes for least-developed countries, an aid-for trade package, improved rules on subsidies and anti-dumping, a trade deal on cotton, and disciplines providing developing countries with additional flexibility to address their special needs.

In the run up to the mini-Ministerial, Director General, Pascal Lamy of the WTO, put it succinctly: "it is the moment of truth." The moment of truth came and went, exposing the deep chasm that exists among member countries. As per some trade specialists, these differences are virtually irreconcilable at this point in time and have seeds of potential destruction, not only of the Doha round but of the WTO itself.

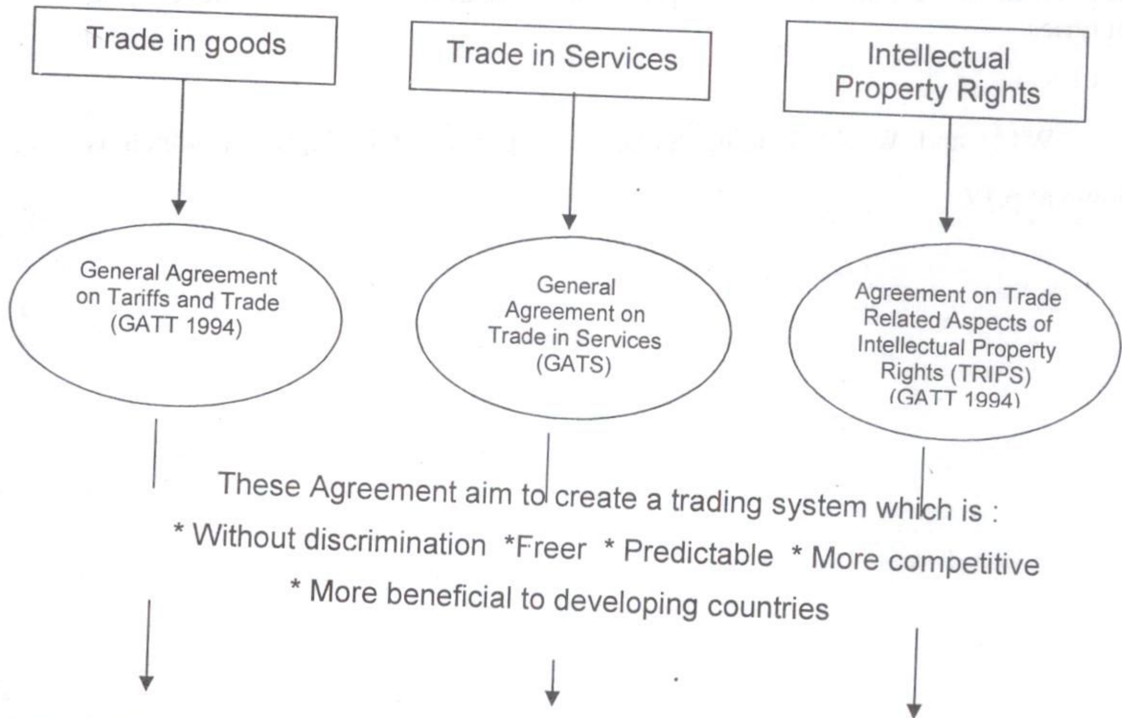
It is expected that the trade ministers would make another attempt in end-July to try and salvage these negotiations. Commentators have pointed out the importance of achieving some breakthrough by end July so as to complete the Doha round by December 2006, as special powers to US administrations to negotiate trade expires by then and is unlikely to be extended. Should that

happen, the Doha Round, currently on life support systems, would be formally declared dead - a none too happy prospect for both developed and developing countries.

WTO and World Trading System are portrayed in Figure 1 which is shown at p.17.

FIGURE – 2

WTO AND WORLD TRADING SYSTEM



Associate Agreement Cover	Agreement covers	Agreement covers
Customs Valuation	Business and professional services	Patents
Pre-shipment Inspection	Communication	Copyrights
Product Standards (TBT)	Distribution services	Trademarks
Regulation for farm products and food safety (SPS)	Educational Services	Industrial designs
Import Licensing	Environmental services	Geographical indications
Safeguards	Construction and related engineering services	Undisclosed information
Subsidies and Countervailing Measures	Financial services	

Anti-dumping	Health services	
Trade-Related Investment Measures	Tourism and travel-related services	
Textiles and Clothing	Recreational, cultural and sporting related services	
Agriculture	Transport services	
Rules of Origin	Other services	

The Singapore Ministerial meet also established working groups to deal with the first three issues and directed the WTO Council for Trade in Goods to handle the last issue. The Second Ministerial meet, which was held in Geneva in 1998, was more of a celebration of the fifth year of GATT. However, some new issues were also taken up like e-commerce, trade and environment, labour standards, fresh rounds of industrial tariff negotiations, textiles and clothing, transparency in WTO functioning, problems of developing countries, unilateral action by developed countries, etc. Besides, the ground was prepared for a comprehensive new round of talks-the Millennium Round-particularly at the instance of the EU and its allies. The third Ministerial meet was held at seattle in early December 1999, and was expected to discuss many crucial issues, including the preparations for the Millennium Round of negotiations. It was to review the progress on new issues raised at the Singapore meet, including the problems of less developed countries.

In short, the thrust was to be on the implementation of the existing Agreements (Built-in-Agenda) as well as on some new issues, such as(i) E-Commerce,(ii) Trade & Environment,(iii) Transparency in WTO's Work Processes, and (iv) Trade and Labour, etc. The Seattle meeting received unprecedented worldwide attention thanks to the massive anti-trade demonstrations that disrupted talks and the successful conduct of discussions and decisions on the formal agenda. The 'mobilisation against globalization' was spearheaded by an unwieldy mix of consumer groups, labour unions, environmentalists and other activists. The WTO came to be portrayed by critics as "the power house of globalization, seen as a malign force or even as a conspiracy". Unfortunately, however, what was not easily recognized is the fact that globalization has become inevitable, thanks to the forces of economics, technology and international relations. Further, the present surge in global

integration is essentially driven by advances in communications and computing technology.

Uruguay Round Negotiations

The world wide trade negotiations under the aegies of GATT (forerunner of WTO) began at Punta Del Estte, Uruguay in 1986 and concluded after 8 years of multilateral round of talks in 1994 in Marrakesh. With the formation of WTO, issue wise details having impact on the dynamics of the Indian economy narrow down to the following.

Multi Fibre Arrangement (MFA)

This clause in force since 1974 entities the developed countries to fix quotas of Textiles imports. It was decided in this round to phase out this system in 3 stages in 10 years' time, by January 1, 2005. The Agreement on Textiles and Clothing (ATC) enforcing MFA however is rescheduled to be closed by 31.12.2003. This greater market access was agreed upon as a quid pro quo for the rapid liberalization of trade and investment rules (covered under TRIMS) in developing countries.

From 1974 until the end of the Uruguay Round, the trade was governed by the Multi Fibre Arrangement (MFA). It is a framework for bilateral agreements or unilateral actions that established quotas limiting imports into countries whose domestic industries were facing serious damage from rapidly increasing imports. The quotas conflicted with GATT's general preference for custom tariffs instead of measures that restrict quantities. Since 1995, the WTO's Agreement on Textiles and Clothing (ATC) has taken over from the Multi Fibre Arrangement. By 2005, the sector was to be fully integrated into in to normal GATT rules. A Textiles Monitoring Body monitors action taken under the agreement to ensure that they are consistent. It reports to the council on Trade in Goods, which reviews the operation of the agreement before each new step of the integration process. The Textiles Monitoring Body also deals with disputes under the Agreement on Textiles and Clothing. If they remain unresolved, the disputes can be brought to the WTO's regular Dispute Settlement Body.

Services

A WTO Council for Trade in Services Overseas the operation of the agreement. The General Agreement on Trade in Services (GATS) is the first ever set of multilateral, legally enforceable rules covering international trade in services. GATS operate on three levels

(a) The main text containing general principles and obligations.
(b) Annexes dealing with rules for specific sectors
(c) Individual countries specific commitments to provide access to their markets.

A framework agreement includes basic obligations of all member countries on international trade in services, including financial services, telecommunications, transport, audio-visual, tourism and professional services, as well as the movement of workers. Among the obligations is a most-favoured-nation (MFN) obligation that essentially prevents countries from discriminating among foreign supplies of services. In addition, countries have made specific commitments on liberalising certain services sectors. These commitments include national treatment (that is, to treat foreign suppliers of services like domestic suppliers) and provision of market access. Negotiations on telecommunications, audio-visual, and maritime services are to resume after the ministerial signing of the Final Act. Furthermore, after implementation, participants will have the opportunity to take exemptions from MFN obligations in financial services. The framework agreement also established the basis for progressive liberalisation of international trade in services through successive round of negotiations, which also applies to other agreements under the Final Act.

Agriculture

Agreement on Agriculture was made under GATT, 1994 to achieve greater liberalization of trade in agriculture and also with the following objectives:

i. to establish a basis for initiating a process of reform of trade in agriculture;

ii. to establish a fair and market-oriented agricultural trading system;

iii. to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets;

iv. to achieve specific binding commitments in market access, domestic support, export competition;

To provide special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries.

The Uruguay Round agreement is a significant step towards order fair competition and a less distorted sector. The objective of the Agriculture Agreement is to reform trade in the sector and to make policies more market – oriented. The new rules and commitments apply to :

(a) *Market access* – Various trade restrictions confronting imports

(b) *Domestic Support* – Subsidies and other programmes including those that raise or guarantee farm gate prices and farmers' incomes.

(c) *Export subsidies and other methods used to make exports artificially competitive* - Developing countries do not have to cut her subsidies or lower their tariffs as much as developed countries and they are given extended period to complete their obligations. The Agreement Prohibits export subsidies on agricultural products unless the subsidies are specified in a member's list of commitments. Where they are listed, the agreement requires WTO members to cut both the amount of money they spend or export subsidies and the quantities of exports that receive subsidies. During the six – year implementation period, developing countries are allowed under certain conditions to use subsidies to reduce the costs of marketing and transporting exports.

Industrial Products (Market access)

It was envisaged in the Uruguay round to phase out the industrial quantitative restrictions for the all round growth of the world trade order and converting it into more level playing field.

Under this agreement, tariffs on industrial products are to be reduced by more than 1/3 on average. In industrial countries, tariff would be eliminated in several sectors (for instance, steel, pharmaceuticals, wood and wood products).

In the context of market access in India, it has often been mentioned that rates of import tariffs in India are quite high, which has had its impact on development of the trade and industry. The import tariffs prevailing in India, however, need to be seen in the right perspective. The indirect taxes contribute a major proportion of the revenue of the Union Government. Any reduction in the rates of import duties will have its impact on the central kitty unless suitably augmented by other resources. Besides, the domestic producers in India have several disadvantages as compared to manufactures in the world markets, such as higher costs of capital and power, low productivity of labour and lack of efficient infrastructural support. The domestic producers, therefore, are required to be protected from a straight competition from imports, unless they are provided with an internationally competitive operating environment. A competition can never be fair between unequals. Competition amongst those placed in similar situations is expected to produce healthier results but competition among unequals would only generate distortions. Even in sports, a featherweight is not supposed to fight against a heavyweight. How can the developing countries be then expected to compete at the same level with the developed countries?

Technical Barriers

The agreement seeks to ensure that technical negotiations and standards as well as resting and certification procedures; do not create unnecessary barriers to trade. To this end, it encourages countries to use international standards, but does not oblige harmonisation of standards. At the same time, it recognises the right of countries to establish protection - for example, for human, animal, or plant life; health; and the environment - at levels they consider appropriate, and

specifies that they should not be prevented from ensuring that their desired standards are met.

Government Procurement

The Final Act contains procedures designed to facilitate the membership of developing countries in the existing Government, Procurement Agreement. In addition, negotiations on a new agreement on Government Procurement, not formally part of the Uruguay Round, are proceeding and are expected to conclude in the near future. The objectives of these negotiations include broadening the coverage of the Agreement to include services as well as (already covered) goods and to include procurement by levels of government that are subordinate to central Governments.

Anti-Dumping Rules

The agreement provides greater clarity and more detailed rules concerning the method of determining dumping and injury, the procedures to be followed in anti-dumping investigations, and the duration of anti-dumping measures. It also clarifies the role of dispute-settlement panels in conflicts relating to anti-dumping actions taken by national authorities. A number of issues that could not be sorted out have been delegated to the Committee on Anti-dumping for resolution.

Anti-Dumping Actions

If a Company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. Is this unfair competition? Opinions differ, but many governments take action against dumping in order to defend their domestic industries. The WTO agreement does not pass judgment. Its focus is on how governments can or cannot react to dumping - it disciplines antidumping actions. The legal definitions are more precise, but broadly speaking the WTO agreement allows governments to act against dumping where there is genuine ("material") injury to the competing domestic industry. In order to do that the government has to be able to show that dumping is causing injury.

Anti-Dumping and Countervailing Duties

Countervailing duties (CVD) together with anti-dumping (AD) measures are often linked. Ma:.y countries handle the two issues under a single law, apply similar process to deal with them and give a single authority responsible for investigations.

There are a number of similarities. The reaction to dumping and subsidies is often a special offsetting import tax (countervailing duty in the case of a subsidy). Like anti-dumping duty, countervailing duty is charged on products from specific countries and therefore it breaks the GATT principles of binding a tariff and treating trading partners equally (MFN). The agreements provide an escape clause, but they both also say that before imposing a duty, the importing country must conduct a detailed investigation that shows injury to domestic industry. But there are also fundamental differences, and these are reflected in the agreements. Dumping is an action by a company. With subsidies, it is the government or a government agency that acts, either by paying out subsidies directly or by requiring companies to subsidize certain customers. But the WTO is an organization of countries and their governments. The WTO does not deal with companies and cannot regulate companies' actions such as dumping. Therefore the Anti-Dumping Agreement only concerns the actions governments may take against dumping. With subsidies, governments act on both sides: they subsidize and they act against each others' subsidies. Therefore, the subsidies agreement disciplines both the subsidies and the reactions.

The present rules revise the Tokyo Round (1973-79) code on anti-dumping measures and are a result of the Uruguay Round (1986-94) negotiations. The Tokyo Round code was not signed by all GATT members: the Uruguay Round version is part of the WTO agreement and applies to all members. The WTO Anti-Dumping agreement introduced these modifications- more detailed rules for calculating the amount of dumping, more detailed procedures for initiating and conducting anti-dumping investigations, and rules on the implementations, and rules on the implementation and duration.

The agreement says member countries must inform the Committee on Anti-Dumping Practices about all preliminary and final antidumping actions,

promptly and in detail. They must also report on all investigations twice a year. When differences arise, members are encouraged to consult each other. They can also use the WTO's dispute settlement procedure.

Subsidies and countervailing measures

This agreements does two things-it disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. It says a country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the country can launch its own investigation and ultimately charge extra duty (known as "countervailing duty") on subsidized imports that are found to be during domestic producers. The agreement builds on the Tokyo Round Subsidy code. Unlike its a predecessor, the present agreement contains a definition of subsidy. It also introduces the concept of a "specific" subsidy i.e. a subsidy available only to an enterprise, industry, group of enterprises, or group of industries in the country (or state, etc) that gives the subsidy. The disciplines set out in the agreement only apply to specific subsidies. They can be domestic or export subsidies.

Further Measures Required to Ensure Fair Play

The Agreement on Anti-dumping and the Agreement on Subsidies and Countervailing Measures, recommend Members to follow lesser duty rule i.e. to impose anti-dumping duty or countervailing duty only to eliminate the extent of margin of injury suffered by the domestic producers, in case the margin of injury is lower than the margin of dumping or the amount of subsidy. Countries like USA and Canada, however, impose full duty, which results in over-protection of their domestic producers. Another aspect of anit-dumping duties and countervailing duties is that they tend to encourage inefficiencies and complacency on the part of the domestic producers. The domestic producers can get the protection only if the dumped or subsidized imports cause them injury, generally determined in terms of difference between their high cost of production and the import prices. The high cost of production, often is a result of inefficiencies and once the domestic producers get the shelter of the protective measures, there is no compulsion or encouragement for them to reduce their costs, as they can continue to reap the benefit of the protective measures as long

as they can prove the fact of dumping subsidization and injury resulting there from. This needs to be seriously looked into. The safeguard measures in this regard, however, demand the domestic producers to identify their weaknesses and to draft a restructuring plan so as to become competitive in a given framework of time. This is a much-needed improvement in the other protection measures as well to ensure a fair play.

The existing WTO rules and agreements govern almost all aspects of the international trade. The developing country Members, however, often find it difficult to effectively defend their interests due to heavy costs and effort involved, for example in contesting anti-dumping and intellectual property cases. The need is to ensure fair interpretation and implementation of these disciplines so as to provide an equal opportunity to all, the haves and the have nots. These issues need to be sorted out in a mutually satisfactory manner, before embarking upon any fresh initiatives or enlarging the scope of the existing commitments any further.

General Agreement on Trade in Services (GATS)

The GATS applies in principle to all service sectors except "services supplied in the exercise of governmental authority". These are services that are supplied neither on a commercial basis nor in competition with other suppliers' viz social security schemes and central banking.

The General Agreement on Trade in Services which extends multilateral rules and disciplines to services is regarded as a landmark achievement of the UR, although it achieved only little in terms of immediate liberation. Because of the special characteristics and the socio-economic and political implications of certain services, they have been generally subject to various types of national restrictions. Protective measures include visa requirements, investment regulations, restrictions on repatriation, marketing regulations, restrictions on employment of foreigners etc. Heavily protected services in different countries include banking and insurance; transportation; television, radio, film and other forms of communications; and so on.

The GATS covers four modes of international delivery of services

- Cross- border supply (trans border data flows, transportation services)
- Commercial presence (Provision of services abroad through FDI of representative offices).
- Consumptions abroad (tourism).
- Movement of Personnel (entry and temporary stay of foreign consultants).

While industrial countries have offered market access commitment of some kind on over half (about 54 per cent) of their services activities, developing countries did so only on less than one-fifth (about 17 per cent) of their service categories. Tourism and travel related services are the only activities in which a substantial number of developing countries made commitments.

The framework of GATS includes basic obligation of all member countries on international trade in services, including financial services, telecommunications, transport, audio visual, tourism, and professional services, as well as movement of workers.

Among the obligations is a most favoured nation (MFN) obligation that essentially prevents countries from discriminating among foreign suppliers of services.

Another obligation is the transparency requirements according to which each member country shall promptly publish all its relevant laws and regulations pertaining to services including international agreements pertaining to trade in respond promptly to all requests for specific information. by any other member, pertaining to any aspect of the service covered by the GATS. Each member shall also establish one or more enquiry points to provide specific information to other members. However, no member needs to provide any confidential information, the disclosure of which would prejudice legitimate commercial interests of particular enterprise, public or private.

The GATS lays down that increasing participation of developing countries in world trade shall be facilitated through negotiated commitments on

access to technology, improvements in access to distribution channels and information networks and the liberalization of market access in sectors and modes of supply of export interest to them.

With reference to domestic regulation, the Agreement lays down that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. There would be requirements that parties establish ways and means for prompt reviews of administrative decisions relating to the supply of services.

It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *interalia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

Trade in services on which it has undertaken specific commitments including on payments or transfers for transactions related to such commitments. A member country may, therefore, apply restrictions on international transfers and payments for current transactions under certain circumstances envisaged under the GATS. In the event of serious balance of payments and external financial difficulties or threat thereof, á member may adopt or maintain restrictions on the commitments of member countries under the GATS.

The Agreement on Trade in Services also establishes the basis for progressive liberalization of trade in services through successive rounds of negotiations, which also applies to other agreements under the Final Act.

Although many services are labour intensive and all the developing countries are expected to have an advantage, yet there have been several constraints in benefiting from this advantage. These include, technical, organizational, financial and legal. Moreover, immigration laws of developed countries restrict the manpower flow from the developing to developed countries. This severely limits the scope of developing countries in benefiting from their comparative advantage. It may bė noted that the industrial countries did not like to bring this issue in the Uruguay Round.

Modes of supply

The GATS sets out four modes of supplying services;

1. Mode 1 : Cross-border trade
2. Mode 2 : Consumption abroad
3. Mode 3 : Commercial presence
4. Mode 4 : Presence of natural persons

Mode – 1

Cross-border trade corresponds with the normal form of trade in goods and maintains a clear geographical separation between seller and buyer. In this case services flow from the territory of one member into the territory of another member crossing national frontiers. (E.g. banking or architectural services transmitted via telecommunications or mall).

Mode – 2

Consumption abroad refers to situations where a service consumer moves into another Member's territory to obtain a service (e.g. consumer travelling for tourism, medical treatment, to attend educational establishment).

Mode – 3

Commercial presence is the supply of a service through the commercial presence of the foreign supplier in the territory of another WTO member. In this case a service supplier of one member establishes a territorial presence, including through ownership or lease of premises, in another member's territory to provide a service. (E.g. the establishment of branch offices or agencies to deliver such services as banking, legal advice or communications)

Mode – 4

Presence or movement of natural persons (this only refers to export of manpower) covers situations in which a service is delivered through persons of a Member country temporarily entering the territory of another Member country. Examples include independent service suppliers (e.g., doctors, engineers,

individual consultants, accountants, etc.) However, GATS covers only temporary movement and not citizenship, residence or employment on a permanent basis. in the foreign country. Let us consider a specific example to distinguish between the four modes of supply. A particular firm in country 'X' establishes a subsidiary in country 'Y' to provide services. This is supply of services through Mode 3 i.e. *Commercial Presence.* An architect of the said firm sends blueprints over the Internet to another firm in country "Y"-this is Mode 1 i.e. *Cross Border Supply.* An Engineer from the said firm is deputed to work in the subsidiary firm established in country 'Y' for a limited period for managerial operations this is Mode 4 i.e. *Movement of Natural Persons.* Certain trainees from the subsidiary in country 'Y' visit country 'X' and avail of both education and tourism services in country 'X'-this is Mode 2 exports i.e. *Consumption Abroad* for country 'X'.

Basic Principles of GATS

- All services are covered by GATS
- Most-favoured-nation treatment applies to all services, except the one-off temporary exemptions
- National treatment applies in the areas where commitments are made
- Transparency in regulations, inquiry points
- Regulations have to be objective and reasonable
- International payments: normally unrestricted
- Individual countries' commitments: negotiated and bound
- Progressive liberalization: through further negotiations
- Services supplied from one country to another (e.g. international telephone calls), officially known as "cross-border supply"
- Consumers or firms making use of a service in another country (e.g. tourism), officially known as "consumption abroad"
- A foreign company setting up subsidiaries or branches to provide services in another country (e.g. foreign banks setting in operations in a country), officially "commercial presence"

Individuals traveling from their own country to supply services in another country (e.g. fashion models or consultants). Most favoured-nation (MFN) treatment favour one, favour all. MFN means treating one's trading partners equally. Under GATS, if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service provides from all other WTO members. MFN applies to all services, but some special temporary exemptions have been allowed. National treatment-equal treatment for foreigners and one's own nationals – is treated differently for services. For goods (GATT) and intellectual property (TRIPS) it is a general principle. In GATS it only applies where a country has made a specific commitment, and exemptions are allowed.

Once a government has made a commitment to open a service sector to foreign competition, it must not normally restrict money being transferred out of the country as payment for services supplied "current transactions" in that sector.

Obligations contained in the GATS may be categorized into two groups:

- General obligations which apply directly and automatically to all Member countries of the WTO, regardless of the existence of commitments made for each sector;
- Conditional obligations which apply to sectors where the Member country has assumed market access and national treatment obligations.

WTO and Small and Medium Enterprises

In India, a SSI unit is defined as one where investment in plant and machinery whether held on ownership terms or on lease or by hire purchase does not exceed Rs.10 million (1 USD = Rs.49). There also exists a definition for micro-enterprises, which are popularly known as "Tiny Units". A tiny unit is one where investment in plant & machinery does not exceed Rs. 2.5 million. The Indian small scale sector has been fortunate to build upon a heritage of enterprise, dynamism and renewal. Despite two centuries of colonial rule and

total lack of external support, the sector has reestablished itself and consolidated over the last 50 years. From about 80,000 units in the late 1940s to over 3.5 million units today, the sector has been proving its mettle time and again. The last decade of the 20th Century has seen this sector maintain its steady growth. The SSI sector in India alone contributes 7% to India's GDP.

Composition of SME Sector

The industry sector is broadly segmented into three categories :

A. Large scale factory sector
B. Small scale factory sector

The difference between the above two is on the basis of upper limit on investment in plant and machinery. The SME sector comprises of different segments such as SMEs, ancillary undertakings, tiny units, export-oriented units, women enterprises and small scale service and business (industry related enterprises). This segmentation has been taken up in tandem with the socio-economic policies of the country from time to time.

C. Village and small industries sector

(i) Modern small scale industries are those which use power driven machinery and possess superior production techniques. These can be divided into:

a. SME units (both in factory and non-factory sectors)
b. Power loom units

(ii) Traditional small scale industries comprise Tiny and Cottage Industry segments like handloom, Khadi and village industries, handicrafts, sericulture, silk and coir. These industries have been categorized under the Govt. of India's new SSI policy of August 1991. These industries are mostly labour intensive with nominal value of investment in plant and machinery and are generally located in rural and semi-urban areas.

Status of SMEs in India

The SME sector in India produces over 7500 products ranging from consumer goods to sophisticated machinery and computer peripherals and covers a wide spectrum of industries. As per estimates of office of DC (SSI), total number of registered units in the SME sector in 2000-01 stood at 3.37 million, producing goods and services worth Rs 6455 billion and employing 18.56 million persons. The SME sector accounts for about 95% of industrial units in the country and 40% of value added in the manufacturing sector. With a share of 7% in GDP, SME sector ranks next to agriculture in employment generation.

Status of SME Sector

Year	No. of Units (million)	Production (Rs billion)	Employment (million persons)	Export (Rs million)
1973-74	0.42	72	3.97	3.93
1980-81	0.87	281	7.10	16.43
1985-86	1.35	612	9.60	27.69
1990-91	1.95	1553	12.53	96.64
1995-96	2.66	3627	15.26	364.70
1996-97	2.80	4119	16.00	392.48
1997-98	2.94	4626	16.72	444.42
1998-99	3.08	5207	17.16	489.79
1999-00(Prov.)	3.21	5729	17.85	542.00
2000-01 (est.)	3.37	6455	18.56	599.78

Source : SIDBI Report on SSI Sector, 2001

The SME sector's total contribution to the country's exports has been estimated at 45-50% whereas direct exports are estimated to constitute about 30%. The main items of export are gems and jewellery, sports goods, readymade garments, woollen garments and knitwear, plastic products, processed foods and leather products.

Impact of WTO on SSI Sector

In India, a wide array of policies and a host of institutions have been developed to promote the healthy growth and development of the SMEs. The SMEs were provided sufficient protection with significant fiscal incentives as well as availability of credit at subsidized interest rates during the pre-reform era. However, with the initiation of economic liberalisation since 1991, there has been a paradigm shift in the approach to development. Moreover, India being a signatory to the WTO agreements, trade barriers have been significantly brought down. As a result, SMEs are getting exposed to competitive forces from within as well as from abroad. However, the developmental policy relating to SMEs has continued. The establishment of a separate Ministry of Small Scale Industries and Agro & Rural Industries 1999 coupled with a host of institutions at the federal and the state levels have gone a long way in promoting the SME sector. The Millennium Mission of the Government of India also helped in creating a sound policy environment to help the SME sector to cope with the challenges of globalization.

The launch of the Credit Guarantee Scheme in August 2000 to increase the flow of bank credit to the SME sector has helped to address the issue of collaterals. The scheme provided for a guarantee cover to all loans, even without any collateral, extended by banks to SME borrowers upto Rs 2.5 million. The Credit Guarantee Fund Trust is also in the process of conceptualising and implementing a framework for securitisation of loans extended by commercial banks. Further, the extension of "priority sector" status to SMEs has played a crucial role in meeting their financial requirements.

The Government removed Quantitative Restrictions (Import Licensing Quotas) on 714 items by 31.3.2000 and remaining 715 items have been removed from Quantitative Restrictions by 31.3.2001. The QR removal is bound to make the reservation policy of Small-Scale sector redundant. Out of 812 reserved items 556 items were freed in April 1999 and put on Open General License only 256 items were under SIL and restricted list thereafter. Different levels of protection in form of tariff barriers were accorded to these 556 items.

Globalization implies that cheaper alternatives become increasingly accessible and as a consequence domestic SMEs are required to increasingly confront a new challenge - remaining competitive. This competitiveness is not just in respect of costs — it is also in respect of technology, credit, management practices and marketing strategies. SMEs are responding to this challenge in different ways. While refusal to acknowledge that the problem exists can be seen in a few SMEs, a vast majority of them are reacting differently - some are re-engineering business processes, some are striving for quality certification, few are identifying niches where low volumes exist and hence large competition is not present and, finally, some other SMEs are looking at a solution which is arguably more holistic - that of becoming part of a larger production chain through partnerships and linkages.

A number of small scale industry (SSI) bodies such as Indian Council for Small Industries, Federation of Associations of Small Industries in India, Laghu Udyog Bharti and Swadeshi Jagran Foundation backed Centre for Bharatiya Marketing Development have come together to seek a slew of policy initiatives from the Central Government to turn around the SSI sector. The study brought out by these organisations has recommended a single piece legislation covering all labour matters.

The greatest challenge for SSI development is the availability of infrastructure facilities within reach and cost. In order to strengthen and make SSI sector more effective and efficient, infrastructure facilities viz. power, water, transport and communication, environment be made available to them at reasonable cost so as to ensure effective utilization of capacities, realize adequate price of products through cost reduction and easy accessibility and competitiveness.

SSI units must keep their research, development and training up to date or obtain services of export organisations in this regard so as to meet the changes, which are likely to happen often. Permanent exhibition sites be developed in each State and at various places in each State through Central and State funding so that products of SSI, SMEs and tiny industries could be exhibited periodically. Price preference scheme offered by States for SSI sector should be made more effective, simpler and efficient which should really enable units to take its benefit. Large corporations also realise that they cannot do everything in

the most efficient manner. They are concentrating on their core competencies, preferring to outsource many activities - be it sub-assembly or precision manufacturing. This is where a plethora of opportunities have opened up for SMEs, whereby a win-win solution is created for both the principal, who is freed to concentrate on the more crucial tasks of final assembly and marketing, while the SME can concentrate on production without having to worry about marketing its produce.

No doubt, WTO has already created some far reaching implications for the SME sector in India, specifically with regard to their competitive ability and integration with the global markets. Most of the problems arise due to the unorganised nature of this sector, lack of data and information, use of low technology and poor infrastructure in the country. Hence we may have to redefine the SSI unit in tune with international SME definition so that SSIs are able to match with them and become comparable with global SSI, What is required at this juncture is that the SSIs should convert themselves into small scale enterprises which would include services. Further, Small Industries have to reposition themselves in certain strategic sectors where India has proven comparative advantages. They are also required to build up a strong data base of products, process and cost of production in India and abroad.

Review Questions

1. Explain the need for constitution of WTO
2. Why was WTO established?
3. What is GATT? Differentiate it from WTO.
4. What is meant by quantitative Restrictions?
5. Discuss the objectives, constitutions and structure of WTO.
6. Describe the out come of various Ministerial Conferences.
7. Explain the key subjects in WTO.

UNIT – 2

WTO AND AGRICULTURE

Intellectual Property of whatever species is in the nature of intangible incorporate property. In each case, it consists of a bundle of rights in relation to certain material object crated by the owner. In respect of patent the property consists of the exclusive right to use the invention patented, to grant licences to others to exercise that right to a third person. There are many similarities in the law relating to the different species of intellectual property in regard to the nature of property, mode of its acquisition, the nature of rights conferred, the commercial exploitation of those rights, the enforcement of those rights and the remedies available against infringement of those rights.

IPRs facilitate investments across the countries and help both the right holders and the beneficiary countries. Much of the technological information would not have come to the light of the world and further advancement in research would not have taken place if there was no incentive for the inventor to protect his innovation and exploit it to his advantage. Protection of plant varieties and inventions, prevention of the various practices of unfair competition, unfair business practices, copying and piracy of technology, protection of traditional knowledge and biological resources are the main concerns of an IPR system. In India, the following laws are in use for regulating the intellectual property rights:

1. Patents Act 1970
2. The Designs Act 2000
3. The Trade Marks Act 1999
4. The Copyright Act 1957
5. The Geographical Indications of Goods
   [Regn. and Protection] Act 1999
6. The Protection of Plant Varieties and Farmers Rights Act, 2001

The requirements of WTO with regard to the intellectual properties are stated in Agreement on Trade Related Intellectual Property Rights[TRIPS]. This Paper concentrates on patents, geographical indications, Sanitary and phyto-

sanitary measures and the protection of farmers' rights as they are more relevant when we discuss the impact of IPRs on Agriculture.

Agreement on Agriculture

Agriculture has been part of Uruguay Round from the beginning. In all the countries, governments follow protectionary measures in Agricultural Sector like remunerative prices, subsidies, tariff and non-tariff protection. The objective of Agreement on Agriculture (AoA) is to make agriculture market oriented. The main issues addressed by AOA are 1] market access 2] domestic support measures [3] Export subsidies [4] TRIPS [5] Sanitary and phyto-sanitary measures

Market access is tried to be achieved through tariff reductions and tariff bindings. The domestic support measures are quantified through Aggregate measure of support [AMS]. This is calculated on product by product basis and aggregated. Also non-product specific subsides are added. The commitment to reduction of domestic support applies to this total amount. As a result there is flexibility in the mechanism and countries are not bound to reduce support measures for individual products. They can shift support measures from one product to the other based on their own priorities. Developed countries are required to reduce their AMS by 20% over six years and developing countries by 13.3% over 10 years from 1995.

Domestic support (as measured through AMS), market access and export subsidies were the contentious issues in the Cancun Summit. Export subsidies, input subsidies for fertilisers and electricity, concessional interest rates and market price support (except export subsidies all these are deemed to be domestic support measures) are considered trade distorting by the AoA (Agreement on Agriculture) and hence are to be reduced. For most developing countries including India, however, base AMS (Aggregate Measure of Support has two parts: product specific, i.e., Minimum Support Price expressed in terms of avg. rates of exchange minus External Reference Price times the quantity which gets the support and non product specific, i.e., subsidies on inputs such as fertilizers, electricity, irrigation etc) levels were negative, while base AMS for most of the developed countries was high. Under the market access provisions of the AoA relating to domestic support, members are required to reduce the

total AMS by 20 per cent for the developed countries over a period of six years (1995-2000) and 13.3 per cent for the developing countries over a period of ten years(1995-2004) - so as to reach the AMS levels of the base period (1986-88). The AMS in India is negative and below 10% of the agricultural produce permitted for developing countries under both market price support and input subsidies components. The organisation of subsidies in various Boxes under the AoA favour developed countries.

Bio- Informatics

Bio - informatics is a new and emerging branch of biotechnology that has come up very recently. It primarily involves the use of computer software to utilize information from the vast biological database that is developed by experienced biotechnologist. Gene sequencing is a part of bio-informatics wherein a lot of data related to biotechnology within the ambit of information technology, and hence the label bio-informatics. And this, like all other branches of information technology is a high growth area today. It involves use of IT in areas like genetics and drug discovery. With the application of bio-informatics tool, the process of drug discovery programmes could be speeded by three to four years. Opportunities for bio-informatics lie in the research sector, maintaining database and in creating software. Bio-informatics is also applicable in the areas of genomic, and in combinatory chemistry. Software engineers who work on normal software development projects can't expect to work on bio-informatics projects, since it requires knowledge of both IT and biology. In India, the Indian Institute of Sciences, Bangalore is a prominent institute where a lot of research is being conducted in this field.

Bio-Technology

Bio-technology has been rightly called the Technology of the new millennium the best thing to happen to this globe after the information technology revolution. It is being presented as a panacea, a cure to solve all the problem of twenty first century-food scarcity, controlling pests, increasing yields and so on. Biotechnology increases agricultural productivity with guaranteed yields and innovative products. It is an environmentally sound approach with depleting natural resources such as land and water reduces erosion of topsoil and obliterates the need for harmful chemicals. It produces better quality and heal

their foods with improved nutritional value, appropriate calorie content and reduced allergens. As a farming technology, it does not discriminate between the small and big farmers, provides inbuilt crop protection against insect and pests and increases farmer income and reduces risks. The increasing farmer population, depleting natural resources, call for alternatives to chemical pesticides and a host of other problems are troubling the agricultural community.

Ayurvedic Medicines

Most of the companies manufacturing Ayurvedic medicines in India either depend on non-standardised extracts or powder of crude drugs for formulating Ayurvedic medicines due to the limited supply of goods extracts. Of late many small sector industries have started coming up with extracts manufacturing activities. Some big ones are also diversifying into this business considering the unfathomable market potential. The net profit in the extract business varies from 15% to 70% with an average of 32% in case of domestic selling. In case of exports the profit margins may be 100% and above.

Extraction, as the term is used pharmaceutically, involves the separation of medicinally active portion of plant or animal tissues from the inactive or inert components by using selective solvents in standard extraction procedures. The products so obtained from plants are relatively impure liquids, semisolids or powders intended only for oral or external use. These include classes of preparations known as decoction, infusions, fluid extracts, tinctures, paste (semi-solid) extracts and powdered extracts.

The purpose of standardised extraction procedures for crude drugs is to attain therapeutically desired potion and eliminate the inert material by treatment with a selective solvent known as menstruum. The extract thus obtained may be ready for use as a medicinal agent as such in the form of tinctures or fluid extracts, or it may be further processed to be incorporated in any dosage form such as tablets, capsules or it may be fractionated to isolate individual chemical entities. Thus standardisation of extraction procedures contributes significantly to the final quality of the herbal drug.

General Methods of Extraction of Medicinal Plants

- Maceration – Complete extraction is not possible
- Infusion – Complete extraction is not possible
- Digestion – Complete extraction is not possible
- Decoction – Only applicable to heat stable constituents
- Percolation – Complete extraction is not possible
- Hot continuous extraction (Soxhlet) – Volatile constituents cannot be isolated
- Aqueous alcohol extraction by fermentation – Volatile constituents cannot be isolated.
- Counter current extraction (CCE) – Thermolabiale constituents cannot be extracted
- Ultrasound Extraction (Sonication) – Deleterious effect sound energy on the active constituents.
- Supercritical fluid extraction (SFE) – Only lypophillic compounds are extractable.

PATENTS AND INDIAN AGRICULTURE

Any invention can be patented. The invention may relate to a new product or an improvement of an existing product or a new process of manufacturing existing or new products. The invention must be new, involve an inventive step and capable of industrial application. While any invention is patentable, a discovery cannot be patented. A discovery relates to new information and knowledge which already exists in nature; invention on the other hand relates to the creation of new product or process etc, which never existed before. For example, the following cannot be patented:

1. An invention which claims anything obvious or contrary to well-established natural laws
2. Primary or intended use is contrary to law or morality or injurious to public health
3. Invention not resulting in a new product
4. The invention is merely an admixture
5. A method of testing a manufacturing process
6. Method of agriculture or horticulture
7. A curing method for animal, human or plants
8. An invention relating to atomic energy

Indian Patents Act, as amended, provides for both product and process patents. However, for chemical substances which are used as intermediates in the manufacture of medicines and drugs, only process patents will be given and not product patents. Also, in the case of food items and substances prepared through chemical processes (including alloys, optical glass, semiconductors and inter-metallic compounds) only process patents will be allowed.

However, by 2005, India has to provide for the convenient of patent rights to all inventions, whether product or processors, in all fields of technology except:

1. Diagnostic, Therapeutic and surgical methods for the treatment of humans or animals.
2. Plants and animals and biological processes for the production of plants or animals.

However, micro-organisms and non-biological processes, micro biological processes. fermentation process and microbial metabolites can be patented. In the US, genetically engineered plants and animals are patentable.

As a transitory measure, exclusive marketing rights have been provided in our Patents Act for all inventions until 2005.

Article 27[3] of the TRIPS Agreement allows countries to protect their plant varieties through a separate law or sui generic system or by a combination of both. India has enacted The Protection of Plant Varieties and Farmers Rights Act 2001 in tills regard.

It may be noted that medicine or drug includes insecticides, germicides, fungicides, weedicides and all other substances intended to be used for protection or preservation of plants. As the law stands at present, agricultural chemicals used otherwise than for protection and preservation of plants is not covered by the definition of medicine or drugs and hence out of patent protection. This requires amendment to conform to TRIPS.

Sec 83 of Patents Act makes it clear that patent rights are granted only to encourage inventions and their exploitation on a commercial basis and not for the purpose of enjoyment by patent holders as monopoly rights. Debate on TRIPS in India has focused on patents and Plant varieties but until recently, ignored geographical indications. It is afraid that granting of patent rights to agricultural products will have the following consequences.

1. Patent holders, which are normally Multinational Corporations meet the Indian market demand only through imports and these MNCs may not establish production facilities at all in our country.

2. Patent licences may be refused to local industrialists and if at all licences are offered, unreasonable terms may be stipulated thereby, discouraging the locals to go for patent licences.

3. Restrictive conditions on the use, sale or lease of the patented article, may be prescribed by the patent holder, thereby prolonging their monopoly rights even after the expiry of the patent, which is 20 years under TRIPS.

Again, MNCs own genetically engineered varieties of seeds of food and cash crops and when these are sold in India, they may be sold at abnormal prices. Farmers may not be allowed to save these seeds for their own harvest, as these seeds are patented seeds. Due to this, our yield rates may be affected and exports may become uncompetitive. There may happen substantial control over

an entire range of seeds, fertilisers, pesticides , These MNCs will have command not only on inputs but also on investments, production, distribution and marketing over agro-based industrial sector, agro-trade and agro-services.

In agriculture, the most critical areas which are likely to be affected by IPRS are patenting of Plant varieties and genes and geographical indications. Again, TRIPS, as part of WTO, provides for a formal dispute settlement mechanism among countries. On the positive side, incorporation of IPRs and geographical indications in our agricultural will improve our market access into the markets of European and US markets. Again, it is possible that our agricultural research will get impetus and stimulation.

Modem science has facilitated bio-technology application in agriculture. The techniques adopted are tissue culture diagnostic and manipulation of DNA to genetically engineer the DNA in Cells. Hlo-technology application for the propagation of vegetables, fruits and other species of commercial importance which are not amenable for large scale propagation through seeds or those who have a long pre-productive phase could be a priority area with the introduction of IPRS into our agriculture.

Both TRIPS and our own patent law provide scope for alleviating the hardships arising out of the granting of IPRS. Our patent law provides the following safeguard measures.

1. Life forms are not patentable. Similarly patents will not be granted for Plants and animals except micro-organisms, micro-biological processes, fermentation process and microbial metabolites.

2. On circumstances of extreme urgency and national emergency government can allow domestic production and import of patent products derived from patented process.

3. If the patented invention is not available to the public at a reasonable price, compulsory licensing provision will be invoked and licence will be given to a third party on suitable terms. Also, where another patent cannot be worked without the use of the given patent, then compulsory licence may be given for the latter patent.

4. Patent inventions are allowed for use in research.

5. Under exhaustion principle, once a product has been sold, the atent right over the product is lost by the patent holder and he cannot have right over what happens to the product thereafter. Hence, patented products can be imported using this principle from foreign markets.

Agreement on application of sanitary and phytosanitary measures

Article 14 of the agreement on agriculture requires members to give effect to the agreement on sanitary and phytosanitary measures. The agreement seeks to institute a multilateral framework of rules and disciplines to guide the adoption, development and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade. Moreover, it seeks to harmonize sanitary and phyto sanitary measures between members on the basis of standards, guidelines and recommendations developed by the relevant international organizations. The Agreement however does not define what is necessary to protect human health. These issues left considerable discretion with the members in setting their own levels of SPS protection.

The Doha Ministerial Declaration on implementation related issues and concerns decision of 14 Nov.2001 on the SPS Agreement interalia provides that the phrase 'longer time frame for compliance' referred to in Article 10(2) of the Agreement on the Application of Sanitary and phytosanitary measures shall be normally be a period of not less than 6 months. Where the appropriate level of S&P protection does not allow scope for the phased introduction of new measures. but specific problems are identified by a member applying the measure. shall upon request enter in to consultations with the country to find a mutually acceptable solution.

Sanitary and Pyto – Sanitary measures ensure:

1. Products shall come from disease free area.
2. Inspection is carried out on products
3. Required treatment or processing is carried out for the patented products.

4. Maximum allowable standards of pesticide residues are followed
5. Only permitted food additives are used.

Countries can get protected from the misuse of patented products by also relying upon the provisions of the agreement on technical barriers to trade, without creating deliberately any barriers to international trade. Under these regulations stipulations are made regarding packing, marketing, and labelling as well as procedures for testing and certification. By using these regulations, countries can protect national security, prevent deceptive practices and protect human health or safety, animal or Plant life or health and their environment. Article 8(2) of TRIPS provides to the effect that patent rights may be denied when it unnecessarily restrains trade or adversely affects the international transfer of technology. Hence, countries can enact comprehensive legislation prohibiting unfair terms for (lie grain, of patent and know-how licensing agreements which restrict competition. Finally, sec 66 of our Patents Act provides that if a patent or the mode in which it is used is mischievous to the state or generally prejudicial to the public, the government may after giving the patent-holder an opportunity revoke the patent.

Protection of Plant Varieties and Farmers Rights

It is important that the age-old farming practices of our farmers are not snatched away in the name of WTO. TRIPS itself recognises the rights of nations over their biological resources and their farmers' rights in the name of multi-functionality. Complying with Article 27(2)(b) of TRIPS Agreement, our Government has enacted The Protection of Plant Varieties and Farmers' Rights Act, 2001 which provides for the establishment of an effective system for the protection of plant varieties, lights of the farmers and plant breeders and to encourage the development of new plant varieties. An enforcement legislation, such as tills, which allows certain exclusive rights on the improved varieties provides encouragement to a successful breeder and his employer and allows him better chance of recovering his costs and accumulating the profits for neither investment m research, and development.[th] In the absence of plant breeders' rights, however these varieties were freely available to others for use, multiplication and sale. New, essentially derived varieties developed abroad, using Indian released varieties as parental material, get protected without any

economic benefits accruing to the Indian institutions. But the varieties bred abroad are only available on payment of royalty, even when the Indian germless was used as one of the parents.[2] The Act requires the plant breeder to affirm a declaration with a view to protecting the farming community at the time of making an application for the protection of a variety, stating that the newly bred variety does not contain the terminator gene. If the reasonable requirement of seeds \ planting material of a protected variety is not available to the public at a reasonable rate, any person can apply for a compulsory licence to take up the production, distribution and sale of that seed\planting material. Also, the licensing authority can revoke the compulsory licence, if the licensee fails to make available seeds\planting materials at a reasonable rate. Again, a national gene fund has been put in place that will be used to reward the farmers for conserving bio-diversity and developing new varieties and for sustainable use of genetic resources.

Geographical Indications

In order to protect goods originating since long time from specific locations and the fact is in the public domain, Geographical Indications of Goods (Registration and Protection) Act 1999 has been enacted by the Indian government. Examples for such goods are basmati rice, Tanjore plates, Kancheepuram silk sarees etc. The quality, reputation or other characteristic of these goods is essentially attributable to their geographical origin and no other person in any other location can claim intellectual property right over those goods. The Act provides for the registration of geographical indications and gives exclusive rights to the use of these goods to the registered owners. The registered proprietor can seek relief in the appropriate court of law when there is infringement of the geographical indication. The person who infringes the geographical indication is also punishable with imprisonment as specified in the Act.

Distortions in farm trade must be addressed

The persistent distortions in global agricultural trade as also protectionist barriers on certain industrial products where developing countries possess a competitive advantage remain as issues that need to be addressed urgently if the wider membership of the WTO is to benefit from the global trade talks. Chairing

a session on trade liberalisation and development at a seminar on "Development in Open Economies", the Special Secretary, Ministry of Commerce and Industry, Mr. S.N. Menon, said that multiple barriers in respect of textiles and clothing and leather items in the developed world were a case in point. "It is now widely acknowledged that the extent of liberalisation achieved in the Uruguay Round was very small, in particular in sectors and products of specific interest to developing countries." He said while the Doha Development Agenda was comprehensive, the importance of specific areas under negotiations for the wider membership of the WTO would need to be judged by their expectations of how it could be achieved in these negotiations and the magnitude of the extant economic distortions. Concerted efforts were needed to uphold the development mandate of the Doha Declaration, Mr. Menon said. Prof Ajit Singh of the Cambridge University said special and differential (S&D) treatment was of key importance to developing countries including India. "Economic openness is a multi-di-mensional thing and a policy of selective openness is likely to bring better results than the policy of free trade, especially if governments take a developmental approach," he said citing the instance of Japan, which was open in terms of exports but closed in terms of imports.

As late as 1978, when Japan was already the member of the OECD (Organisation for Economic Cooperation and Development), manufactured imports of Japan as a percentage of GDP was only 2 per cent compared to 15 per cent and above in other OECD countries. Both Japan and Korea used non-tariff barriers to protect their industries, he said adding that similarly S&D was allowed on a grand scale in the golden days of capitalism (from 1950s to 1970s) when S&D was given to Japan and Europe to restrict imports, he said. In a presentation on effects of trade liberalisation on poverty and differential liberalisation approaches, Dr. Veena Jha, Coordinator, Unctad-India Programme, said that the effects would be better if domestic reforms and stable macro-economic policies as well as institutional reforms accompanied trade liberalisation. In a sectoral analysis of India, the presentation observed that in agriculture, India had high bound tariffs, but applied tariffs were low and yet, imports were small except in items such as cotton and oilseeds. Overall, protection in agriculture in India was not among the highest in comparison to many countries. In fact, total protection in India was estimated at 40.8 per cent, as against 93.7 per cent in Japan and 58.6 per cent in the European Union.

WTO Panel to Examine EU Law On Agriculture Products

The World Trade Organisation has constituted a three-member panel to examine the complaints made by the US and Australia against the European Union claiming that it does not provide the same kind of protection to agriculture products originating from other countries as it does to its own producers under the "protection of trademarks and geographical indications for agricultural products and foodstuffs" legislation. India, which has been promoting geographical indications for protecting its exclusive products like Basmari rice, Darjeeling tea and Alphanso mangoes, has reserved its rights to participate in the panel proceedings as a third party. Other countries which have made a similar request include Brazil, Canada, China, Colombia, Guatemala, Mexico, New Zealand, Norway, Chinese Taipei and Turkey. Although the US and Australia filed separate complaints, the allegations made against the EU are almost similar. The countries complained that the EU regulation did not provide the same treatment to other nationals and products originating outside the EU. They added that the EU diminished the legal protection for trademarks (including to prevent the use of an identical or similar sign that is likely to confuse and adequate protection against invalidation) and did not provide legal means for interested parties to prevent the misleading use of a geographical indication.

The US and Australia also said that the EU did not define a geographical indication in a manner that is consistent with the definition provided in the Trips Agreement. Its definition was not sufficiently transparent and did not provide adequate enforcement procedures. Geographical indication is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin. Most commonly, a geographical indication consists of the name of the place of origin of the goods. They may be used for a wide variety of agricultural products, such as, Tuscany' for olive oil produced in a specific area of Italy (protected in Italy), or 'Roquefort' for cheese produced in France (protected both in the European Union and the US). Whether a sign functions as a geographical indication, is a matter of national law and consumer perception. Under the WTO, the Trips legislation gives advanced protection under geographical indications to wines and spirits.

Implementation of WTO provisions without consideration of the state of technology and agricultural practices followed in our country can play havoc. It has been reported that opening up of agriculture in Mexico has cost few lakhs of lives of agricultural labor there. It is feared that China will have displaced labour and unemployment in millions when it opens up its agriculture. In India also, we are seeing the impact on tea, coffee and other plantations crops. Already legal tussles have erupted over the patenting of basmati, neem, bitter gourd, turmeric, amla etc.

The legal frame work has many safeguard provisions as discussed earlier. The implementation of the safeguard measures should be made transparent and streamlined so that the damaging effects, are checked early and in time. Time has come that we take stock of our strengths and weaknesses and put all our efforts to improve the quality and competitiveness of our products. This is possible when we pursue concerted efforts to codify 'our public knowledge to protect our bio-wealth, admit our weaknesses and concentrate our efforts where we are potentially strong.

Textiles Monitoring Body (TMB)

The Textiles Monitoring Body deals with disputes under the Agreement on Textiles and Clothing. It supervises the agreements implementation. It monitors actions taken under the agreement to ensure that they are consistent, and it reports to the council on trade in goods which reviews the operation of the agreement before each new step of the integration process. The TMB consists of a chairman and 10 members acting in their personal capacity.

Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994

GATT (Article 6) ailows countries to take action against dumping. The Anti-Dumping Agreement clarifies and expands Article 6, and the two operate together. They allow countries to act in a way that would normally break the GATT principles of binding a tariff and not discriminating between trading partners — typically anti-dumping action means charging extra import duty on the particular product from the particular exporting country in order to bring its

price closer to the "normal value" or to remove the injury to domestic industry in the importing country.

There are many different ways of calculating whether a particular product is being dumped heavily or only lightly. The agreement narrows down the range of possible options. It provides three methods to calculate a product's "normal value". The main one is based on the price in the exporter's domestic market. When this cannot be used, two alternatives are available — the price charged by the exporter in another country, or a calculation based on the combination of the exporter's production costs, other expenses and normal profit margins. And the agreement also specifies how a fair comparison can be made between the export price and what would be a normal price. Calculating the extent of dumping on a product is not enough. Anti-dumping measures can only be applied if the dumping is hurting the industry in the importing country.

Therefore, a detailed investigation has to be conducted according to specified rules first. The investigation must evaluate all relevant economic factors that have a bearing on the state of the industry in question. If the investigation shows dumping is taking place and domestic industry is being hurt, the exporting company can undertake to raise its price to an agreed level in order to avoid anti-dumping import duty.

Anti-Dumping Actions

If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. Is this unfair competition? Opinions differ, but many governments take action against dumping in order to defend their domestic industries. The WTO agreement does not pass judgment. Its focus is on how governments can or cannot react to dumping — it disciplines antidumping actions. The legal definitions are more precise, but broadly speaking the WTO agreement allows governments to act against dumping where there is genuine ("material") injury to the competing domestic industry. In order to do that the government has to be able to show that dumping is taking place, calculate the extent of dumping and show that the dumping is causing injury.

Anti-Dumping and Countervailing Duties

Countervailing duties (CVD) together with anti-dumping (AD) measures are often linked. Many countries handle the two issues under a single law, apply similar process to deal with them and give a single authority responsible for investigations. There are a number of similarities. The reaction to dumping and subsidies is often a special offsetting import tax (countervailing duty in the case of a subsidy). Like anti-dumping duty, countervailing duty is charged on products from specific countries and therefore it breaks the GATT principles of binding a tariff and treating trading partners equally (MFN). The agreements provide an escape clause, but they both also say that before imposing a duty, the importing country must conduct a detailed investigation that shows injury to domestic industry. But there are also fundamental differences, and these are reflected in the agreements. Dumping is an action by a company. With subsidies, it is the government or a government agency that acts, either by paying out subsidies directly or by requiring companies to subsidize certain customers. But the WTO is an organization of countries and their governments. The WTO does not deal with companies and cannot regulate companies' actions such as dumping. Therefore the Anti-Dumping Agreement only concerns the actions governments may take against dumping. With subsidies, governments act on both sides: they subsidize and they act against each others' subsidies. Therefore, the subsidies agreement disciplines both the subsidies and the reactions.

The present rules revise the Tokyo Round (1973-79) code on anti-dumping measures and are a result of the Uruguay Round (1986-94) negotiations. The Tokyo Round code was not signed by all GATT members; the Uruguay Round version is part of the WTO agreement and applies to all members. The WTO Anti-Dumping Agreement introduced these modifications — more detailed rules for calculating the amount of dumping, more detailed procedures for initiating and conducting anti-dumping investigations, and rules on the implementation and duration.

The agreement says member countries must inform the Committee on Anti-Dumping Practices about all preliminary and final antidumping actions, promptly and in detail. They must also report on ail investigations twice a year. When differences arise, members are encouraged to consult each other. They can also use the WTO's dispute settlement procedure.

Subsidies and countervailing measures

This agreement does two things — it disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. It says a country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the country can launch its own investigation and ultimately charge extra duty (known as "countervailing duty") on subsidized imports that are found to be hurting domestic producers. The agreement builds on the Tokyo Round Subsidy Code. Unlike its predecessor, the present agreement contains a definition of subsidy. It also introduces the concept of a "specific" subsidy i.e. a subsidy available only to an enterprise, industry, group of enterprises, or group of industries in the country (or state, etc) that gives the subsidy. The disciplines set out in the agreement only apply to specific subsidies. They can be domestic or export subsidies.

Agreement on Subsidies and Countervailing Measures

Detailed procedures are set out on how antidumping cases are to be initiated, how the investigations are to be conducted, and the conditions for ensuring that all interested parties are given an opportunity to present evidence. Anti-dumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would lead to injury. Anti-dumping investigations are to end immediately in cases where the authorities determine that the margin of dumping is insignificantly small,

Prohibited subsidies: subsidies that require recipients to meet certain export targets, or to use domestic goods instead of imported goods, are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other countries' trade. They can be challenged under the WTO dispute settlement procedure where they are handled under an accelerated timetable. If the dispute settlement procedure confirms that the subsidy is prohibited, it must be withdrawn immediately. Otherwise, the complaining country can take counter measures. If domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed.

Actionable subsidies: The complaining country has to show that the subsidy has an adverse effect on its interests. Otherwise the subsidy is permitted.

The agreement defines three types of damage they can cause. One country's subsidies can hurt a domestic industry in an importing country. They can hurt rival exporters from another country when the two compete in third markets. And domestic subsidies in one country can hurt exporters trying to compete in the subsidizing country's domestic market.

Non-actionable subsidies' these can either be non-specific subsidies, or specific subsidies for industrial research and pre-competitive development activity, assistance to disadvantaged regions, or certain types of assistance for adapting existing facilities to new environmental laws or regulations. Non-actionable subsidies cannot be challenged in the WTO's dispute settlement procedure, and countervailing duty cannot be imposed on subsidized imports. There are detailed rules for deciding whether a product is being subsidized, criteria for determining whether imports of subsidized products are hurting ("causing injury to") domestic industry, procedures for initiating and conducting investigations, and rules on the implementation and duration (normally five years) of countervailing measures.

Review Questions

1. What are the provisions governing sanitary and phyto sanitory measures under WTO?
2. Explain agreement on subsidiaries and countervailing measures.
3. Write a note on Agreement on Anti dumping ?
4. Analyse the various technical barriers to trade.

UNIT - 3

VALUATION OF THE GOODS UNDER THE CUSTOMS ACT

Customs Duty in India

In India, the Customs Duty is levied in terms of the provisions of section 12(1) of the Customs Act, 1962, which provides that duties of Customs shall be levied at such rates. As may be specified under the Customs Act, 1975 or any other law for the time being in force (which includes relevant exemption, notifications) on goods imported into, or exported from, India. Generally, duty is levied on almost all the items of imports, but the export duty is levied on a few limited products.

However, section 12(2) provides that the above "Provisions shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

Customs duty on import and export is being levied and collected in the light of the Customs Tariff Act which is based on the HSN system. Customs duty is payable as a percentage of value known Assessable Value'. The value may be either (i) value as defined under Section 14(1) or (ii) Tariff value mentioned in Section 14(2). The method of valuation of goods for both import and export for the purposes of levy of customs duty on the basis of value has been denned under Section 14 of the Customs Act. According to Sec. 14(1), customs duty is chargeable at the rates specified in the Customs Tariff Act. It is chargeable by reference to the value of goods imported or exported. As regards imported goods, the value is determined as per amended clauses (1) and (1A) of Section 14, except where the Central Government fixes tariff values under clause (2) of this section- Imported goods are to be valued in accordance with the rules for customs valuation made by the Central Government under Sec. 14 (IA). The Central Government has accordingly notified the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988. These rules are based on a code developed by the GATT and provide for application of different methods in a given order for determination of the customs value of imported goods liable to ad valorem duty.

The New System

The new rules were brought into effect under the Ministry of Finance, Department of Revenue Notification No. Sl-NT/88-Cus. dated July 18,1988. The rules have been framed in exercise of the powers conferred by Section 156 of the Customs Act, "1962 read with Section 22 of the General Clauses Act, 1897 and in supersession of the Customs Valuation Rules, 1963. These rules are applicable only to imported goods and not to goods for export, where a duty of customs is chargeable by reference to their value and not to duty-free imported goods or imported goods liable to specific rates of duty.

Meaning of Value

Customs duty is chargeable on any goods by reference to their value. The value of dutiable goods shall be deemed to be the price at which such goods are ordinarily sold or offered/or sale, for delivery at the time and place of importation or exportation in the course of international trade, where the seller and buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale. The price should be ascertained with reference to the rate of exchange as in force on the date on which a bill of entry is presented under Section 46 era shipping bill or bill of export, as the case may be, is presented under Section 50.

For the purpose of this Section

(a) The 'rate of exchange' means the rate of exchange

1. determined by the Central Government, or
2. ascertained in such manner as the Central Government may direct for the conversion of Indian currency into foreign currency.

(b) 'Foreign Currency' and 'Indian Currency' have the meanings respectively assigned to them in FERA, 1973.

Key Elements for Determining Value

The important ingredients of Sec. 14(1) for determining the value for the purpose of customs duty are given below:

(i) The price at which such (or similar) goods are ordinarily sold or offered for sale.

(ii) The price for delivery at the time and place of importation or exportation.

(iii) The price should be in the course of international trade.

(iv) The buyer and seller should have no interest in the business of each other.

(v) The price should be the sole consideration for the sale or offer of sale.

(vi) The rate of exchange is determined by the Central Government or ascertained in such manner as the Central Government may direct for the conversion. The exchange rate as applicable on the date or presentation of bill of entry as prescribed by the Central Government should be taken into account.

Customs Duty is Charged on Goods

The customs duty is chargeable only on the goods and not on the person importing the goods or paying the duty. Therefore, it is expected to be passed on to the buyer.

Definition of Goods

Goods have been defined in section 2(22) to include:

(a) vessels, aircraft and vehicles;

(b) stores;

(c) baggage;

(d) currency and negotiable instruments; and

(e) any other kind of movable property;

Goods that are Imported or Exported

Section 12 makes it abundantly clear that importation or exportation of goods into or out of India is the taxable event for payment of the duty of customs.

'Import', as defined in section 2(23), means 'bringing into India from a place outside India' and 'Export', as defined in section 2(18), 'means taking out of India to a place outside India'.

Goods must be specified in Customs *Tariff Act*

Duty is chargeable in respect of goods, which are dutiable in terms of section 12 of the Act *i.e.* which are specified in the Customs Tariff Act, 1975.

Case Law

In Associated *Cement Companies Ltd.* v CC' it was held that if duty rate specified in Customs Tariff Act is 'FREE" *i.e.* nil, no duty would be payable on such goods and hence such goods, are not 'dutiable goods'. If these goods are brought as baggage, no customs duty would be payable.

Duty on Pilfered Goods [Section 13]

If any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer shall not be liable to pay the duty leviable on such goods except where such goods are restored to the importer after pilferage.

Re-Importation of Goods Produced or Manufactured in India [Section20]

If goods are imported into India after exportation there from, such goods shall be liable to duty and be subject to all the conditions and restrictions, if any, to which goods of the like kind and value are liable or subject, on the importation thereof.

Case Law

In *Tata Tea Ltd.* v. CC, it has been held that duty is payable on re-import of goods.

Goods Derelict, Wreck, etc. [Section 21]

All goods, derelict, jetsam, flotsam, and wreck brought or coming into India shall be dealt with as if they were imported into India, unless it is shown to the satisfaction of the proper officer that they are entitled to be admitted duty-free under this Act.

Customs department besides being a revenue earning department is also administering several other enactments. Some of the major laws of this type are Foreign Exchange Management Act, and COFEPOSA, etc.

Customs Law is covered under various Acts, rules, regulations and notifications, some of them are enumerated below;

- Customs Tariff Act, 1975
- Customs Valuation Rules, 1975
- Customs and Central Excise Duties Drawback Rules, 1971
- Tourist Baggage Rules, 1978
- The Import Manifest (Aircraft) Regulations, 1976
- The Export Manifest (Aircraft) Regulations, 1976
- The Export Manifest (Vessels) Regulations, 1976
- Import Manifest (Vessels) Regulations, 1971
- The Boat Notes Regulations, 1976
- Customs House Agents Licensing Regulations/1984
- Customs (Provisional Duty Assessment) Regulations, 1963
- Baggage Rules, 1998.

Methods of Valuation of goods

The New Valuation Rules.1988 (based on GATT Valuation Code) consists of a set of rules providing many independent methods of valuation to be followed in hierarchical order.

To facilitate proper application of rules, exhaustive interpretative notes have been provided by way of Schedule to these rules. Following are the various methods of valuation of goods under the Customs Act, 1962.

- Transaction value of same goods
- Transaction value of identical goods
- Transaction value of similar goods
- Deductive value method
- Computed value method
- Residual method

Transaction Value of Same Goods

According to Rule 3 of Customs Valuation Rules, 1988, the value of any imported goods shall be the transaction value. The expression 'transaction value' means the actual price at which such goods are actually sold. It is the primary method. However, if in the case of any imported goods, the transaction value cannot be ascertained, then other alternative methods will be used in hierarchical order. In other words, if the first method cannot be applied, then the second method should be used and so on. These alternative methods are discussed in the following paragraphs:

Definition of Transaction Value

Rule 4 of Valuation Rules defines transaction value as the price actually paid or payable for the goods when sold for export to India, adjusted in accordance with Rule 9. As per Rule 9 of the Valuation Rules, the price of the imported goods is to be increased by

1. Specified costs and services such as commission, brokerage, cost of containers and packing
2. Proportionate value of goods and services supplied by the buyer, free of charge or at concessional rates for use in production/sale for export of the imported goods like tools, materials, etc.

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3. Royalties and licence fees related to the imported goods required to be paid by the buyer.

4. The value of any part of the proceeds of any subsequent resale, disposal, etc.

5. All other payments made or to be made by the buyer as a condition of sale of the imported goods.

Transaction Value of Identical Goods (Rule 5)

If in the case of any goods, the transaction value cannot be determined, then their value shall be the transaction value of identical goods. Identical goods have been defined in Rule 2(c) as "imported goods which are same in all respects, *e.g.*, physical characteristics, quality and reputation of the goods being valued except for any minor differences which do not affect the value of goods and which have been produced in the same country in which the goods being valued were produced and by the same person or by any other person. However, imported goods in respect of which certain services like engineering, art work, etc., were undertaken in India free of charge or at concessional rates, will be excluded from the purview of identical goods.

The interpretative note to Rule 5 of the Customs Valuation Rules, 1988 requires that the proper officer must use sale of indentical goods at the same commercial level. Where there is no such sale, a sale of identical goods that takes place under any one of the three conditions may be used:

(a) A sale at the same commercial level but in different quantities;

(b) A sale at a different commercial level but in substantially the same quantities; or

(c) A sale at a different commercial level and in different quantities.

After having ascertained a sale under any one of these three conditions, adjustments have to be made for *(a)* quantity factors only, *(b)* commercial level factors only, *(c)* quantity and commercial level factors.

Transaction Value of Similar Goods (Rule 6)

If in the case of any goods, transaction value cannot be found and the valuation under Rule 3 is also not possible, then they will be valued at transaction value of similar goods. Similar goods have been defined in Rule *2(e)* as imported goods *(a)* which, though not identical in all respects, have identical characteristics and components such that they can perform same functions and in terms of quality, reputation and existence of trade mark are commercially interchangeable with the goods being valued; *(b)* which are produced in the same country as in the case of the goods to be valued; and *(c)* which have been produced by the same person or by a different person. However, imported goods in respect of which certain services like engineering, art work, etc., were undertaken in India free of charge or at concessional rates, will be excluded from the purview of similar goods.

Deductive Value Method (Rule 7)

If the imported goods being valued (or identical or similar goods) are sold in India in the same condition as they are imported, and this is at or about the same time when valuation of the goods in question is to be done, then the value of the goods shall be based on the unit price at which the imported goods or identical or similar imported goods are sold in the greatest aggregate quantity to persons who are not related to the seller in India. However, the following deductions will be made: *(a)* the usual commission that is paid/payable or the usual additions for profits and general expenses class or kind; *(b)* the usual cost of transport, insurance, etc., and *(c)* the customs duties and taxes payable on account of import or sale of the goods. If the imported goods or identical or similar imported goods are not sold in India at or about the time of valuation of the goods in question, then the value of the goods will be based on the unit price at which the imported goods or identical or similar imported goods are sold after processing in the greatest aggregate quantity to persons who are not related to the seller in India. However, in such a case, due allowance will be made in respect of the value added by processing and the deductions as referred to above.

Computed Value Method

As this method has not been incorporated in the Customs Valuation Rules, 1988, this method is not a permissible method of customs valuation. The

GATT Agreement provides for reversing the sequence of the computed value method with that of deductive value method at the option of the importer.

Residual Method

The last method is known as the residual method. Where the customs value for assessment cannot be determined under any of the above-mentioned methods of valuation, the assessable value will be determined by applying these methods as well as the general principles and provisions of Sec. 14(1) of the Customs Act. However, under this method, it is not permissible to base the value on the following:

(a) Selling price in India of the goods produced in India;

(b) System of accepting highest of the alternative values;

(c) The price of the goods on the domestic market of the country of exportation;

(d) The price of goods for export to a country other than India;

(e) Minimum customs values;

(f) Arbitrary or fictitious values.

The value of the imported goods determined under this method should be based on previously determined customs values to the extent possible. In other words, the selling price for export to India can alone form the basis.

Agreement on Preshipment Inspection

Preshipment inspection activities are all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and the customs classification of goods to be exported to the territory of the user Member. The term "user Member" means a Member of which the government or any government body contracts for or mandates the use of preshipment inspection activities. This inspection is carried out on the territory of exporter Members. The Agreement on Preshipment Inspection shall apply to all preshipment inspection activities carried out on the territory of

Members, whether such activities are contracted or mandated by the government, or any government body of a Member.

Article 2 has laid down the obligations of user members which are enumerated below :

Transparency

User Members shall ensure that preshipment inspection activities are conducted in a transparent manner. The Preshipment inspection entities shall provide the actual information when so requested by exporters.

Non-Discrimination

User Member shall ensure that preshipment inspection activities are carried out in a non-discriminatory manner, and that the procedures and criteria employed in the conduct of these activities are objective and are applied on an equal basis to all exporters affected by such activities.

Standards

User Members shall ensure that quantity and quality inspections are performed in accordance with the standards defined by the seller and the buyer in the purchase agreement and that, in the absence of such standards, relevant international standards apply.

Safeguarding secrecy of business information

User Members shall ensure that preshipment inspection entitles treat all information received in the course of the preshipment inspection as business confidential to the extent that such information is not already published, generally available to third parties, or otherwise in the public domain. User Members shall ensure that preshipment inspection entities maintain procedures to this end. User Members shall ensure that preshipment inspection entities do not divulge confidential business information to any third party, except that preshipment inspection entities may share this information with the government entities that have contracted or mandated them. User Members shall ensure that

preshipment inspection entities, bearing in mind the provisions on protection of confidential business information, maintain procedures to avoid conflicts of interest.

Site of Inspection

User Members shall ensure that all preshipment inspection activities, including the issuance of a Clean Report of Findings or a note of non-issuance, are performed in the customs territory from which the goods are exported or, if the inspection cannot be carried out in that customs territory given the complex nature of the products involved, or if both parties agree, in the customs territory in which the goods are manufactured.

Avoiding inordinate dealy

User Member shall ensure that preshipment inspection entities avoid unreasonable delays in inspection of shipments.

Guidelines to prevent over / under invoicing

User Members shall ensure that, in order to prevent over-and under-invoicing and fraud, preshipment inspection entities conduct price verification according to the following guidelines:

1. preshipment inspection entities shall only reject a contract price agreed between an exporter and an importer if they can demonstrate that their findings of an unsatisfactory price are based on a verification process which is in conformity with the criteria set out;
2. the preshipment inspection entity shall base its price comparison for the verification of the export price on the prices of identical or similar goods offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale, in conformity with customary commercial practices and net of any applicable standard discounts;
3. when conducting price verification, preshipment inspection entities shall make appropriate allowance for the terms of the sales 'contract and generally applicable adjusting factors pertaining to the transaction;

4. the verification of transportation charges shall relate only to the agreed price of the mode of transport in the country of exportation as indicated in the sales contract;
5. the following shall not be used for price verification purposes:
   - the selling price in the country of importation of goods produced in such country;
   - the price of goods for export from a country other than the country of exportation;
   - the cost of production;
   - arbitrary or fictitious prices or values.

Provision for grievance redressal

User Members shall ensure that preshipment inspection entities establish procedures to receive, consider and render decisions concerning grievances raised by exporters, and that information concerning such procedures is made available to exporters.

Article 3 has laid down obligations of exporter members which are enumerated below :

Transparency

Exporter Members shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

Technical Assistance

Exporter Members shall offer to provide to User Members, if requested, technical assistance directed towards the achievement of the objectives of this Agreement on mutually agreed terms.

Non-discrimination

Exporter Members shall ensure that their laws and regulations relating to preshipment inspection activities are applied in a non-discriminatory manner.

Review Procedures

Members shall encourage preshipment inspection entities and exporters mutually to resolve their disputes. However, two working days after submission of the grievance, either party may refer the dispute to independent review. The independent entity shall establish a list of experts. The list shall be publicly available. It shall be notified to the Secretariat and Circulated to all Members. the exporter or preshipment inspection entity wishing to raise a dispute shall contact the independent entity and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. Members shall take such reasonable measures as may be available to them to ensure that the following procedures are adopted.

1. The independent trade expert drawn from the above list shall serve as the Chairman of the panel;

2. If the parties to the dispute so agree, one independent trade expert could be selected from the above list by the independent entity to review the dispute in question. This expert shall take the necessary decisions to ensure an expeditions settlement of the dispute;

3. The object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of this Agreement;

4. Decisions by a three-member panel shall be taken by majority vote;

5. The decision of the panel shall be binding upon the preshipment inspectionentity and the exporter which are parties to the dispute.

Agreement on Rules of Origin

The rules of origin are those laws, regulations and administrative determinations of general applications applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences. Rules of origin shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of most-favoured - nation treatment; anti-dumping and countervailing duties; safeguard measures;, origin marking requirements and any discriminatory quantitative restrictions or tariff quotas. They also include rules of origin used for government procurement and trade statistics.

Discipline to be maintained during the transition period

Until the work programme for the harmonization of rules of origin is completed, Members shall ensure that:

1. when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined;

2. rules of origin shall not themselves create restrictive, distorting or disruptive effects on international trade;

3. the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members;

4. their rules of origin are administered in a consistent, uniform, impartial and reasonable manner;

5. their rules of origin are based on a positive standard;

6. their laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published in accordance with relevant provisions;

7. When introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retrospectively as defined in their laws or regulations;

8. any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures;

9. all information that is by nature confidential for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government.

Discipline to be maintained after the transition period

Members shall ensure, upon the implementation of the results of the harmonization work programme, that:

1. they apply rules of origin equally for all purposes;
2. under their rules of origin, the country to be determined as the origin of a particular good is either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out;
3. the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good as domestic and shall not discriminate between other Members;
4. the rules of origin are administered in a consistent, uniform, impartial and reasonable manner;
5. their laws of general application relating to rules of origin are published in accordance with the relevant provisions;
6. any administrative action which they take in relation to the determination of origin is reviewable promptly;

7. all information which is by nature confidential for the purpose of the application of rules of origin is treated as strictly confidential.

Review

The Committee shall review annually the implementation and operation of the Agreement having regard to its objectives. The Committee shall annually inform the Council for Trade in Goods of developments during the period covered by such reviews.

Harmonization of rules of origin

With the objectives of harmonizing rules of origin and *inter alia,* providing more certainty in the conduct of world trade, the Ministerial Conference shall undertake the work programme on the basis of the following principles:

- rules of origin should be applied equally for all purposes;
- rules of origin should provide for the country to be determined as the origin of a particular good to be either the country where the good has been wholly obtained or, where the last substantial transformation has been carried out;
- rules of origin should be objective, understandable and predictable;
- rules of origin should not be used as instruments to pursue trade objectives directly or indirectly;
- rules of origin should be administrable in a consistent, uniform, impartial and reasonable manner;
- rules of origin should be coherent;
- rules of origin should be based on a positive standard.

Work Programme

The work programme shall be initiated as soon after the entry into force of the WTO Agreement as possible and will be completed within three years of

initiation. The Committee and the Technical Committee shall be the appropriate bodies to conduct this work. To ensure timely completion of the work programme for harmonization, such work shall be conducted on a product sector basis as represented by the Harmonized System nomenclature.

Role of the Committee

The Committee shall consider the interpretations and opinions of the Technical Committee periodically in accordance with the time-frames with a view to endorsing such interpretations and opinions. The Committee may request the Technical Committee to refine or elaborate its work and to develop new approaches.

The Ministerial Conference shall establish the results of the harmonization work programme in an annex as an integral part of this Agreement. The Ministerial Conference shall establish a time-frame for the entry into force of this annex. This Agreement contains at the end two Annexes. One contains the responsibilities and representation the Technical Committee on Rules of Origin. The other contains the content of common declaration with regard to preferential rules of origin.

Agreement on Import Licensing Procedures

Import licensing is defined as administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member. Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT, 1994, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members. The rules for import licensing procedures shall be neutral in application and administered in a fair equitable manner. The rules shall be published 21 days prior to the effective date of requirement. Members which wish to make comments in writing shall be provided the opportunity to discuss these comments upon request. Application procedures and renewal procedures shall be

as simple as possible. No application shall be refused for minor documentation errors. The foreign exchange necessary to pay for licensed imports shall be made available to licence holders. The Provisions of this Agreement shall not require any Member to disclose confidential information.

Automatic Import Licensing

Automatic import licensing is defined as import licensing where approval of the application is granted in all cases, and the following provisions shall apply to automatic import licensing procedures:

- automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing. Automatic licensing procedures shall be deemed to have trade-restrictive effects unless *inter alia;*

- any person, firm or institution which fulfils the legal requirements of the importing Member for engaging in import operation involving products subject to automatic licensing is equally eligible to apply for and to obtain import licenses;

- applications for licences may be submitted on any working day prior to the customs clearance of the goods;

- applications for licences when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of 10 working days.

- The automatic import licensing may be necessary whenever other appropriate procedures are not available. It may be maintained as long as the circumstances which gave rise to its introduction prevail and as long as its underlying administrative purposes cannot be achieved in a more appropriate way.

Non-automatic Import Licensing

Non-Automatic Import Licensing procedures are those import licensing not falling within the provisions of the Automatic Import Licensing procedures. Non-automatic licensing shall not have trade-restrictive or trade-distortive effects on imports additional to those caused by the imposition of the restriction. In the case of licensing requirements for purposes other than the implementation of quantitative restrictions. Members shall publish sufficient information for other Members and traders to know the basis for granting and allocating licences.

Where a Member provides the possibility for persons, firms or institutions to request exceptions or derogations from a licensing requirement, it shall include this fact in the information published. Members shall provide, upon the request of any Member having an interest in the trade in the product concerned all relevant information.

Members administering quotas by means of licensing shall publish the overall amount of quotas to be applied by quantity and value, the opening and closing dates of quotas, and any charge thereof, within the time periods specified and in such a manner as to enable governments and traders to become acquainted with them. In the case of quotas allocated among supplying countries, the Member applying the restrictions shall promptly informall other Members having an interest in supplying the product concerned of the shares in the quota currently allocated.

Any person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence. The period for processing applications shall not be longer than 30 days if applications are considered as and when received. and no longer than 60 days if all applications are considered simultaneously.

The period of licence validity shall be of reasonable duration and not be so short as to preclude imports. When administering quotas. Members shall not prevent importation from being effected in accordance with the issued licences, and shall not discourage the full utilisation of quotas. In allocating licences, the Member should consider the import performance of the applicant. In the case of

quotas administered through licences which are not allocated among supplying countries licence holders shall be free to choose the sources of imports. In the case of quotas allocated among supplying countries the licence shall clearly stipulate the country or countries.

Institutions

A Committee on Import Licensing Composed of representatives from each of the Members is established for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives.

Notification

Members which institute licensing procedures or changes in these procedures shall notify the Committee of such within 60 days of publication. Notification of the institution of import licensing procedures shall include the list of products, subject to licensing procedures; contact point for information on eligibility; administrative body for submission of applications; expected duration of the licensing procedure etc. Members shall notify the Committee of the publication in which the information required will be published.

WTO and Trade in Services

Is Indian Industry gearing itself to challenges of globalisation and if so, to what extent? This issue is of great importance in the post. W.T.O scenario. Undoubtbly, global markets offer opportunities for all. But opportunities do not guarantee the desired results. For high performing Asian Economies as well as for china, the benefit of globalisation is clearly reflected in the rising ratio of their trade (imports plus exports) to GDP which is currently hovering around 40% to 45%. But in case of India, even granting the fact that our trade to GDP ratio has increased in the post, reforms period from about 13% of GDP in the early nineties to about 20% of GDP at present, we have a long way to catch up with the levels achieved by the Asian Tigers.

The Bretton Woods Conference held during 1944 saw the origin of three organisation viz., International Monetary Fund (IMF), International Bank for

Reconstruction and Development (IBRD), Known as World Bank and International Trade Organisation (ITO). All the organisations were established with the primary objective of monitoring international trade and payments. The third one was instrumental in the creation of a legal agreement known as the General Agreement on Tariffs and Trade (GATT).

WTO cover Trade in Goods, Trade in Services, Trade Related Investment Measures (TRIMs); Trade Related Intellectual Property Rights (TRIPs); Dispute Settlement Mechanism; and Dumping and Anti Dumping Rules, etc.

Trade in services was for the first time brought under the preview of GATT in the Uruguay Round. A wide range of services which engaged attention under the agreement include accountancy, advertising, architectural & engineering, audio – visual, business, computer, construction, distribution, education, energy, environmental, express delivery, financial, telecom, tourism, health, legal, logistic, courier, professional, sports, education and transport related services. However, although a more formal body called General Council of Services which governs General Agreement on Trade in Services (GATS) has been made functional since 1995, many of the services segments are not fully liberalized by now. By 2005, all the barriers are stated to be further liberalized in goods and services trade.

The third Ministerial meet was held at Seattle in early December 1999, and was expected to discuss many crucial issues, including the preparations for the Millennium Round of negotiations. It was to review the progress on new issues raised at the Singapore meet, including the problems of less developed countries. In short, the thrust was to be on the implementation of the existing Agreements (Built-in-Agenda) as well as on some new issues, such as: (i) E-Commerce, (ii) Trade & Environment, (hi) Transparency in WTO's Work Process, and (iv) Trade and Labour, etc.

The Seattle meeting received unprecedented worldwide attention thanks to the massive anti-trade demonstrations that disrupted talks and the successful conduct of discussions and decisions on the formal agenda. The 'mobilisation against globalisation' was spearheaded by an unwieldy mix of consumer groups, labour unions, environmentalists and other activists. The WTO came to be portrayed by critics as "the power house of globalisation, seen as a malign force

or even as a conspiracy". Unfortunately, however, what was not easily recognised is the fact that globalisation has become inevitable, thanks to the forces of economics, technology and international relations.

Business firms around the world trade to invest and invest to trade. Developing countries and economies in transition are no longer in a position to diversify their exports on any importance scale unless they attract investment which become all the more important as aid budgets of international agencies come under continuous pressure. Nor, without inward investment such countries are likely to restructure and develop their service sectors which are to adequately support manufacturing activities and be services exporters in their own right. It may be emphasized here that the General Agreement in Trade in Services (GATS) was largely founded on the notion that services suppliers need to invest and establish themselves within markets in order to supply those markets. Thus, investment is not a new issue for the World Trade Organisation, the main problem is how to go further, and where Inward investment has traditionally been promoted and protected by the new work of bilateral, regional and multilateral treaties, some 60% of the 900 such treaties have been negotiated in the past 10 years. Added to these are investment conditions included in regular consultations through joint commissions, Joint Committee, consultations, negotiations, monitoring of trade and investment flows, etc. which are now well established, periodical exercises. Altogether this hardly suggests a very coherent or predictable climate for investment world wide. It is causing concern to the WTO whose Director General Renato Ruggerio has pointed out that "In fact the present situation is the very antithesis of what the global economy would argue for…… It is important that attempts to secure international rules on investment do not run counter either to existing WTO commitment or to the WTO's work programme.

This agreement includes all services trade, including financial services and provides a framework for multilateral negotiations on improved market access for foreign services. The four modes of delivery are : cross border supply (e.g) supply of diskettes, blueprints etc), consumption abroad (e.g. a tourist availing of services abroad), commercial presence (e.g. form of legal entity established abroad like bank branches, hotels etc) and movement of natural persons (e.g. Physical Movement of professionally, skilled and unskilled labour for temporary period to supply in a foreign market.. but does not include

permanent (movement). The governments of developed countries seek market access through the FSA for this large financial / telecommunication transports firms which face mature markets at home and possess advanced cost savings technology to exploit business opportunity and higher rates of return in the offshore economies. On the other hand, the capital scarce developing countries are more interested in foreign capital flows, which will supplement their domestic savings to support growth oriented policies. As India looks for greater market access through the movement of natural persons, the issue that may come up is of non-tariff barriers. GATS allows member countries to use all kinds of ways to block movement of natural persons, India's needs to take proactive stance on this as movement of natural persons is an important sources of foreign exchange for it.

Services Negotiations of the WTO

Though the services were eventually included on the Uruguay Round Agenda, they were included on a separate track that led to the emerge of the General Agreement on Trade and Services (GATS). The GATS represents the first multilateral efforts to establish rules governing services and provides a frame work for multilateral negotiations on improved market access for foreign services. The GATS negotiations in the financial services sector covered all financial services including banking, securities and insurance.

The financial services agreement (FSA) under WTO was completed on 13 December 1997, which included market opening commitments by 102 WTO members. The FSA in considered as a milestone for the WTO as it extended the GATs to financial services adding to existing agreement in the telecommunication and information technologies industries.

India's services sector has grown manifold during the last two decades. More than half of India's gross domestic product (GDP), at present, is contributed by its services sector, compared to 38% two decades ago. The sector has driven economic growth and offers various linkages for the rest of the sectors. Some of the services sectors have clocked unprecedented growth compared to many other sectors in the economy. Software sector registered an annual compounded rate of growth of more than 50% since last few years and it constitutes 1.7% of GDP at present. In the changing global scenario, many of

the segments under the services sector would post remarkable growth and contribute in a greater measure to employment and income generation in India.

Many foreign companies in India are engaged in business process outsourcing (BPO) in several services segments. According to industry sources, worldwide market for Information Technology Enabled Services (ITES) was of the order of $13.5 billion in 2000. This is projected to increase to around $142 billion in 2008. Potential segments within ITES include back office operations, remote education, data search, market research and customer interaction services and medical transcription. India stands out in value chains of most IT enabled services compared to other counterparts like Singapore, China, Philippines, Mexico, Ireland, Holland and Australia. India is well endowed with low cost skilled human resources to its advantage. Industries, such as banking, insurance, airlines, and healthcare services require large scale data entry and revenue accounting jobs.

Risks and benefits for developing countries' banking systems from the internatialization of financial services are duly examined by WTO and World Bank in a study titled "The Internationalization of Financial Services: Issues and Lessons for Developing Countries" The study suggests that the internationalization of financial system through introduction of international standards and practices. Increased competition and openness in financial sector also spurs internationalization of financial services are also influenced by other types of financial reforms, such as, privatization, deregulation and capital account liberalization. Capital account liberalization helps in reaping the benefits from the internationalization of financial sector. Similarly, it is also vital to develop a supportive institutional framework so that the roles of state and marker are judiciously blended in streamlining the financial institutions.

Anti – Dumping Duties / U.S. Violation

In a major trade victory for India and several other countries, the World Trade Organisation (WTO) has held as violation of global trade rules a controversial U.S. law allowing American companies to collect more than $470 million in anti-dumping duties from the U.S Government. The ruling was given by an Appellate body of the Geneva-based WTO while upholding a finding of a three member Dispute Settlement Panel (DSP), which was challenged by the

U.S. The ruling is the latest in a spate of U.S defeats at the WTO after India, me IS-nation European Union, Australia, Brazil, Canada, Chile, Indonesia, Japan, Mexico, South Korea and Thailand brought the case before the world trade body.

"The U.S Continued Dumping and Subsidy Offset Act of 2000 is inconsistent with certain provisions of the WTO agreements on anti-dumping and on subsidies because it is a specific action against dumping or a subsidy," the ruling said. The high profile case prompted more complaints than any other since the WTO was founded in 1995, with 11 governments challenging the so-called Byrd amendment, named after an American Senator who sponsored their law. Six other countries were also parties to the case and supported their objections. The three-member WTO panel had ruled in September that the U.S had unfairly awarded penal duties collected from foreign competitors to American companies including U.S. Steel Corp., Hershey Foods Corp. and Timken Co. which won trade complaints.

The WTO endorsed the views taken by India and other complainants that Governments must keep with it the antidumping duties slapped on foreign companies and that distributing the funds to companies encourages them to file trade complaints.

Review Questions

1. What is value ? How is it determined under the Customs Act, 1962?
2. Discuss the various methods of valuation of goods the Customs Act, 1962.
3. Explain the provisions applicable to automatic import licensing procedures.
4. How are disputes settled in the case of Agreement on Import Licensing ?
5. What is GATs ? Explain the services that come under the purview of WTO.
6. Explain provisions governing agreement on Rules of origin.

UNIT - 4

TRIPs

Need for Intellectual Property Laws

The objective of enactment of statutes governing IPRs is to ensure that adequate standards of protection exist in member countries. At this juncture, it is to be observed that the IPRs are protected around the world and they are brought under common international rules. When there are disputes over IPRs, the WTO's disputes settlement system is now available. Following issues are comprehensively covered by the TRIPs agreement.

TRIPs

TRIPs provides guidelines for harmonization of IPR laws in the World Trade Organization (WTO). These are intended to reduce distortions and impediments to international trade by taking into account the need to promote adequate and effective protection of IP and ensuring measures, including procedures, to enforce IPR. The national laws are expected to comply with the basic requirements of TRIPs. It should be appreciated that although the treaties on IPR are international in character, their enforcement is national or at best in some cases regional. Proper understanding and application of the IPR laws in various countries would help in the global positioning of national policies and businesses. The first step to be taken by the member countries is to initiate changes (within the transition periods allowed) in their national IPR laws to strengthen the framework for protection of knowledge assets to ensure a conducive and enabling environment for sustained development, economic growth, creativity and fair business practices. TRIPs brings with it new opportunities for all member countries.

The TRIPs agreement leaves considerable room for its members to implement the various provisions and strike a proper balance between achieving compliance with the minimum obligations and retaining domestic national interests. 'The global IPR landscape will have undergone significant redesigning in the next few years. The future therefore lies in the creation and understanding of diverse national IPR laws, global/national knowledge diffusion

processes, and utilization of all possible resources with speed and cost-effectiveness.

Types of Intellectual Property

The TRIPs Agreement deals with seven Types of Intellectual Property. They are :-

- Patents
- Industrial Designs
- Copy-right and related rights
- Trademarks
- Geographical indications
- Layout designs of integrated circuits
- Protection of undisclosed information

The features of TRIPs agreement are :-

- non compliance of the provisions will be subjected to the dispute settlement within the frame work of WTO;
- intellectual property protection;
- rights of the intellectual property holders;
- exception to the right;
- minimum terms of protection;
- extensive protection than the specified agreement;
- procedures and remedies available to enforce the rights with the assistance of judicial authority.

The intellectual property laws namely the Copyright Act, Patent Act, Trademarks Act and Designs Act are designed to encourage the development of art, science, and information by granting certain property rights to artists who are original thinkers and inventors in arts and sciences. The need for protecting the intellectual property rights is based upon the basic argument that innovators require some incentives and recognition. They must be provided some monopoly power through the process of patenting and protecting their intellectual property right. Of course on may argue that protection, for whatever purpose it is meant, is in a way against the principles of market and competition. One may cynically

argue that innovators do not need protection because in a competitive global environment, the innovators and the producers who, through their proficiency and dexterity innovate fast and at lower cost, would be able to capture market and make genuine profits as a result of efficient management of their intellectual and capital resources. However, the proponents of protection do not accept this market principle for the benefit of more powerful innovators.

Designs protection

Design - Definition

A design is defined as, "the appearance of the whole, or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or its ornamentation". The designs applies to the appearance and not be entitled to protection of components unless the component remains visible during the product's normal use. It should be an industrial or handicraft product but excludes computer program complex products where it is composed of multiple components that be replaced and re-assembly of the product is also allowed.

Design - Features

The term design means lines shape etc applied to an article and not the article itself. The designer conceives the features. He gives those ideas conceived by him in a material (visual) form as a pictorial illustration, or a specimen, prototype or model. The features of "pattern or ornament" or "applied" to articles in the literal sense. For instance, textile pattern is applied to the fabric by printing or weaving. The features of "shape or configuration" or "applied" to an article for instance, by making readymade garments in that shape or configuration. Upon on an article made in a particular shape or configuration may be applied to a particular ornament. In such cases, there is blend of both kinds of designs and the two must be separately registered if protection is sought separately. The work article is designed to mean," any article of manufacture and any substance, artificial or natural or partly artificial and partly natural. The features constituting the design must be applied to an article. The design so applied makes the article attractive for sale and is part and parcel of the article itself. The design must be such that in the finished article the features of it,

"appeal to and are judged solely by the eye." A good subject of design must be visually appealing.

In India, the Designs Act, 1911 was enacted to grant protection to designs. It belongs to registered proprietor of the design. On account of considerable progress made in the arena of science technology, there has been an irresistible need to make amendments in the existing legal system for the protection of industrial designs so as to ensure effective protection to registered designs. The Designs Bill 1999 was placed in Parliament in order to balance the competitive environment as well as to ensure that the law does not unnecessarily extent protection beyond what is necessary to create the required incentive for the design activity. The bill received the assent of the President on May 25, 2000. Under the new, "Registered Designs Regulation 2000", it is possible to register fonts and type faces by registered designs right.

Design - Registration

The essential requirements of a design are enumerated below :

- Design is registerable only if it is new, novel and not published before or register in India. The registerable is not an article itself but a feature/an idea or artistic look like pager, cell, CD etc.
- It must relate to features of shape, configuration, pattern or ornamentation only of an article.
- Designs are to be judged by eyes only.
- They must not include any trademark or a property mark.
- An industrial process or means it could be even manual, mechanical or chemical.
- They must not have been published in India on the date of application for registration.

Copyright on registration

The new Designs Act provides for copyright on registration of designs for a period of 10 years from the date of registration, extendable over for a further period of 5 years on an application made to the controller before the expiry of initial period of 10 years. Thus the total period of 15 years of copyright is in line

with the provisions of Agreement on TRIPS, which provides for the protection for a period of at least 10 years. In, ***S.S. Products of India Vs. Star Plast 95 (2002) DLT 84,*** the Court pointed out that when both parties are holding registration of design, each of them can use that design for its products. Though either party can seek cancellation of the design of the other in accordance with law, it would be improper to grant an ad interim injunction if favour of another. Section 53 read with section 2(7) and section 20 of the Code of Civil Procedure, 1908 – Infringement of design – Territorial jurisdiction of High Court – Where the defendant is not resident of Delhi and the plaintiff has no registered office in Delhi, the court in Delhi has no jurisdiction in the matter. In ***Calico Printers Association, Ltd. v. Savani & Co. AIR 1939 Bom.103, 43 Bom. LR 45*** for infringement of the copyright in a registered design that the design of the articles sold by the defendants was a mere colourable imitation of the plaintiffs design.

Prohibition on registration of certain designs

For design protection, the design must be registered. Section 4 of the Designs Act 2000 prohibits registration of those designs which lack novelty or originality. It also prohibits registration of designs which had been disclosed to the public anywhere in India or in any other way published in a tangible form prior to the date of filing or which is not significantly distinguishable from known designs or combination of known designs or comprises scandalous or obscene matter. In ***Rotela Auto Components (P) Ltd., and Another Vs. Jaspal Singh and Others 95 (2002) DLT 830***, the court observed that Design being a conception, suggestion or idea of a shape and not an article, if it has already been anticipated, it is not new or original. Where it has been pre-published, it cannot claim protection, because publication before registration defeats the proprietor's rights to protection under the Act, and provides valid defence to a suit for injunction under sub-section 22 and gives a cause for seeking even cancellation of design as provided in Section 19.

Can unregistered designs be protected?

Section 12 of the Designs Act empowers the controller to restore registration of lapsed designs upon payment of specified fees and additional fees. Unregistered designs may get protection as "trade dress"/getup under common law provided the features of the article together become inherently distinctive so

as to associate the article with the source. Trade dress / Getup of a product is mainly its total image and overall appearance. ***In MRF Ltd. Vs Metro Tyres Ltd.* (1991) IPLR 165** was pointed out that simply because the tread pattern of a tyre has not been registered under the Patents / Designs Act, it does not disentitle the plaintiffs to claim protection to their design under the common law.

Documents and information required for filing a design application

1. Application form stating the full name, address, nationality, name of the article, class no., and address for service in India. The application has to be signed either by the applicant or his agent.
2. Power of Attorney (if necessary.
3. Representations in quadruplicate of the article showing the features of the design by way of drawings/photographs of various views such as top view, bottom view, perspective view, front view and rear view.
4. Priority date, application number and name of country (if priority is to be claimed)
5. Requisite fee.
6. Priority document (if convention application), to be filled along with application or within three months from the date of filing.

Majority of countries that attach significance to protection of Intellectual property Rights is the ***Semiconductor Integrated circuits***. It provides for *sui* generic system of protection of layout designs of integrated circuits which is usually contained in a separate Act. Trade Related Intellectual Property Rights (TRIPs) Agreement under WTO contains provisions with regard to setting up of standards concerning availability, scope and use of Intellectual Property Rights, Geographical indications, Layout Designs of Integrated Circuits etc. India being member of WTO, is under obligation to align its laws in accordance with the TRIPs Agreement and formulate suitable legislations.

Design of integrated circuits calls for considerable expertise and dexterity depending upon the complexity. Micro – electronics which primarily refers to Integrated Circuits ranging from small scale integration to very large scale integration on a semi conductor chip has rightly been recognised as a crore, strategic technology world over.

Semi- conductor Integrated circuits lay out Design Act, 2000

The semi conductor Integrated circuits layout Design Act, 2000, protects intellectual property embedded in the integrated circuits. i.e the layout design of the integrated circuit. The Act is in line with the Trips Agreement to which India is a signatory. The Rules of the Act were brought out and notified in the gazette during the year. The Act is intended for protection of semiconductor Integrated Circuits layout – designs by process of registration, mechanism of distinguishing lay-out ; designs which can be protected, rules to prohibit registration of layout - designs which are not original and / or which have been commercially exploited period for protection, provision with regard to infringement, payment of royalty for registered layout - design and provisions for dealing with willful infringement by way of punishment.

Registration Formalities

Applicants desirous of getting certificate of registration are required to submit the application in the prescribed manner for registrations of layout designs with the office of the semi-conductor Integrated Circuits Layout – Designs registering within whose jurisdiction the main place of business in India of the application is situated.

Duration of Protection

The registration of layout design shall be for a period of 10 years from the date of filing of application.

Can it be assigned?

Yes, The Semi-conductor Integrated Circuits Layout Designs Act, recognises the right of registered progrictor to assign the layout – design for any consideration and give effectual receipts for any consideration for such assignment.

Infringement of Layout – Design

Any Act of reproducing a registered layout design partly or entirely in a integrated circuit, importing or selling or otherwise distributing for commercial purposes a registered layout design. These acts will not be infringement if

performed for the purpose of scientific evaluation, analysis, research or teaching. (Sec. 18)

Appeal

The Act empowers the Appellate Board to ascertain royalty on an application made to it in the prescribed form and to cancel the registration of the registered layout – design on receipt of an application and after giving the opportunity to the opposite party of being heard.

Penalty

Penalty for infringement of layout design has been provided in Section 56 of the Semi conductor Integrated circuits layout Designs Act, which may extend to 3 years imprisonment or with fine which shall not be less than Rs. 50,000 but may extend to Rs.10 lakh or with both. The Act treats false representation of a layout design as registered an offence punishable with imprisonment for a term which may extend to 6 months or with fine which may extend to Rs.50,000 or both.

Patents

Patent is an exclusive right granted to the Patent holder as a reward for his creative work for a specified period. Patent system imparts certain characteristics or tangible property to an invention thereby enabling it, or new products made by using it, to be controlled, exploited or sold in the market place. A patent prevents others from making, marketing and exporting generally for up to 20 years. The significance of patent is succinctly brought out by the Prime Minister's Science and Engineering Council in Australia. Accordingly, "The Protection afforded by intellectual property laws is very important to those business investing in R & D in order to bring new products into the market place, without this barrier, innovation is like a Crop in an unfenced field to be grazed by competitors who have no contribution to its cultivation".

Patents are the government strategies adopted to promote the investment in the knowledge creation by offering the monopoly rights to the inventors for his invention for a fixed period and to ensure the utilization of the knowledge for

development of the society. Patents grant the monopoly rights enabling the inventor to sell, licence etc. over the outcome of the invention for a limited period. Therefore, through this quid-pro-quo agreement between the inventor and the society, the invention is made available to the public and other researchers for further addition and development of the accessible technical knowledge. This form of technology transfer is of prime importance in promoting and aiding further research and development, particularly in medical researches, which rely heavily on previous wor4 while developing new drugs to treat the diseases effectively.

TRIPs and the Human Rights

TRIPs under WTO have always been highlighted as the trade agreement prioritising the economic concerns over the social one. The "Product Patent Regime" in particular, has been accused for ignoring the States' legal obligations for protecting its citizens' right to health as promised in the International Covenant on Economic, Social and Cultural Rights. It has been observed by the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2000, which adopted a resolution on 'Intellectual Property Rights and Human Rights' and confirmed that the promotion and protection of human rights which is the first responsibility of Governments, be in conformity with the Charter of the United Nations. The resolution also requested the World Trade Organization, in general, and the Council on TRIPs, in particular, to take fully into account the State's obligations under international human rights instruments. The Resolution also advised the Governments to integrate into their national and local legislations and policies, the relevant provisions relating to international human rights principles and obligations to protect the social function of intellectual property.

Patent and Access to Members

India never favoured stringent patent protection at least in the areas of vital importance for existence of human per se such as drugs and food. Our late Prime Minister, Indira Gandhi strongly conveyed this feeling to the world in an address to World Health Assembly of WHO in the following words: "Medical discoveries should be free of patents and there should be no profiteering from life and death". Patent Protection for modern drugs system has been brought by

the British Rulers in mid of 19th century. India, initially, offered the process patent with the objective to increase the access to the allopathic medicines to the Indian population with a view to improve | their health conditions.

Post-TRIPs Patent Regime in India : After 31st December, 2004

The post-TRIPs scenario is going to be awesome for the Indian community as well as industry. It is feared that in the absence of the "process patent regime" and easier access for the MNCs to the Indian market will change the domestic health care industry. Domestic players are feared to be wiped off from the market due to greater competition in offering the drug portfolio and its marketing. This will finally result in the increase in the drug prices more than 300% of those prevailing at present. Drug MNCs mostly from developed economies justifies the price hike in the name of the high R&D costs and low probability of market success of a new drug. The dominance of the economic concerns over the social responsibilities as feared earlier has been recently witnessed by the world in the form of legal action from these MNCs against the South African Government, for its regulatory initiatives to provide an access to medicines to the dying population. The studies have reflected that frequently advocated benefits of TRIPs, i.e., the technology transfer to developing countries either through joint ventures, licence or by commissioning of the subsidiaries is not happening in practice. In such circumstances, a countries like India, has to think differently and strategically to safeguard social welfare interests of its population.

Requirements of Patent Agents under New Patent Rules, 2003

Introduction of Patent (Amendment) Act

While India had its Patent Office since 1970, it recognised only the process and not Product Patent in food, drugs, pharma and agro – chemicals. However, after signing the TRIPs agreement in 1994, many changes have been brought about. The Patents Act was amended in March 1999 and June 2002 to meet India'a obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights which forms part of the agreement establishing the WTO. The Joint Committee of Parliament which examined the amendments notified in June 2002 provided in the legislation effective flexibilities to enable

an appropriate, timely and efficient response to national and public interest requirements pertaining to health and nutrition. The Patents (Amendment) Bill 2003 is aimed to bring in amendments under the TRIPs Agreement which are due from January 1, 2005. As the Patent Act is some what technical, in order to simplify the procedural aspect of Patents, the Patent Rules, 2003 have been framed by the Government.

Thus the Third Amendment to the Patent Act was tabled in winter session parliament paving the way for a product patent regime commencing from January, 2005. For the past few years, Pharma Companies have been using patent to complete with foreign players. Software, being an industry where a lot of intellectual property gets created, has been a key driver of the intellectual property movement in India. Besides pharma, now one can see a number of increased electrical and electronics mechanical and chemical industries.

The recent survey on "The World of Indian Patent" published by Business Today is much to be appreciated and worth to be mentioned at this juncture. Accordingly, patents come mainly from technology – intensive industries.

The table given below portrays the extent of patents published in recent years.

Number of Patents obtained Industrywise

Year	Chemicals	Drugs	Electrical & Electronics	Materials	Mechanical	Others**
1997	3,207	1,135	2,349	1,686	350	3,537
1998	3,084	1,371	2,024	405	798	3,490
1999	2,321	1,173	1,367	300	821	2,236
2000	2,293	1,322	1,529	362	745	2,404
2001	2,671	2,176	1,948	591	984	3,161
2002	1,550	1,256	1,176	351	632	1,934
2003*	266	124	142	78	121	357

* Till Jan 2003

** Include general utility patents for technologies like sediment filters.

Source : Business Today, January 2004, p.106.

India is well known for her cultural heritage and rich traditional knowledge. Realising the significance of Patents and understanding the lack of documentation skills in obtaining patents (which probably led to patenting of well known wound healing property of turmeric), several initiatives have been made by the Government of India.

As Patent Act and Patent Rules are highly technical subjects, individuals who are desirous of applying for a patent on their own find it very difficult to comply with the various legal requirements. An attempt has been made in this article to study the requirements of Patent Agents in the light of new Patent Rules 2003 and the proposed Patent (Amendment) Bill 2003.

The Patent Rules, 2003 comprise of 16 chapters with 139 rules. The requirements relating to Patent Agents have been dealt in Rules 108 to 120 under chapter XV of Patent Rules, 2003.

Application for registration of patent agents (Rule 109)

(1) Every person who desires to be registered as a patent agent shall make an application in Form 23.

(2) The applicant is required to furnish such other information as may be required by the Controller.

(3) A person desirous to appear in the qualifying examination under rule 110 shall make a request to the Controller along with the fee as specified in the First Schedule.

Educational Qualifications Prescribed for Patent Agents

A person is qualified to have his name entered in the Register of Patent Agents if he fulfils the following conditions :

(i) He must be a citizen of India

(ii) He must have completed the age of 21 years.

(iii) He must have obtained a degree from any Indian University or possess such other equivalent qualification as is specified by the central Government in addition,

He must

(iv) Be an advocate within the meaning of the Advocates Act, 1961
(v) Have passed the qualifying examination prescribed for the purpose
(vi) Have paid the prescribed fee (Sec. 126)

Clause 61 of the Patent (Amendment) Bill 2003 seeks to amend Sec. 126 (1) (a) with a view to prescribe uniform. Qualification and to improve the quality of profession, as the subject matter in scientific and technical in nature. Further, sub clause (b) seeks to amend sub – section (2) to protect the Patent Agents registered before the commencement of the proposed patents (Amendment) Act, 2003.

Particulars of the qualifying examination for patent agents (Rule 110)

(1) The qualifying examination referred to in clause (c)(ii) of sub-section (1) of section 126 shall consist of a written test and a *viva voce* examination.

(2) The qualifying examination shall consist of the following papers and marks, namely:

Paper 1—Patents Act and Rules	100
Paper II— Drafting and interpretation of patent specifications and other documents	100
Viva Voce	100

(3) The qualifying marks for each written paper and for the *viva voce* examination shall be fifty per cent, each, and a candidate shall be declared to have passed the examination only if he obtains an aggregate of sixty per cent of the qualifying marks.

Disqualifications for registration as a patent agent (Rule 114)

A person shall not be eligible to be registered as a patent agent, if he—

(i) has been adjudged by a competent court to be of unsound mind;

(ii) is an undischarged insolvent;

(iii) being a discharged insolvent. has not obtained from the court a certificate to the effect that his insolvency was caused by misfortune without any misconduct on his part;

(iv) has been convicted by a competent court, whether within or outside India of an offence to undergo a term of imprisonment, unless the offence of which he has been convicted has been pardoned or unless on an application made by him, the Central Government has, by order in this behalf, removed the disability;

(v) being a legal practitioner has been guilty of professional misconduct; or

(vi) being a chartered accountant, has been guilty of negligence or misconduct.

Registration of patent agents (Rule 111)

After a candidate passes the qualifying examination specified in rule 110 and after obtaining any further information which the Controller of patents considers necessary he shall, on receipt of the fee specified there for in the First Schedule, enter the candidate's name in the register of patent agents and issue to him a certificate of registration as a patent agent.

Details to be included in an application for the registration of a patent agent (Rule 112)

An application by a person entitled to be registered as a patent agent under sub-section (2) of section 126 shall also be made in Form 23.

Registration of patent agents under section 126 (2) (Rule 113)

On receipt of an application for the registration of a person as a patent agent under rule 112, the Controller may if he is satisfied that the said person fulfils the conditions specified in sub-section (2) of section 126 enter his name in the register of patent agents.

Section 129 prohibits to practise patent agent unless they are registered as such. This is applicable equally to individuals and to partners of a partnership firm. Similarly no company or other body corporate can practise, hold itself out or describe itself as patent agents, or permit itself to be so described or held out.

The following acts are included within the definition of the world 'practice'.

(i) Applying for or obtaining patent in India or elsewhere;
(ii) Preparing specification or other documents for the purpose of this Act or of the patent law of any other countries.
(iii) Giving advice other than of a scientific or technical nature as to validity of patents or their infringement.

Practice by Non- Registered Patent agent (Sec. 123)

If any person contravenes the provisions of Sec 129 and practices as a Patent Agent, he will be punishable with fine which may extend to Rs.10,000 in the case of the first offence and Rs.40,000 in the case of a second or subsequent offence.

Clause 60 of the Patent (Amendment) Bill, 2003 seeks to amend Sec.123(i) by increasing the penalty from ten thousand rupees and forty thousand rupees as at present. To one lakh rupees and five lakh rupees respectively. These amendments are proposed with a view to strengthening the penalty provisions.

Particulars to be contained in the register of patent agents (Rule 108)

(1) The register of patent agents maintained under section 125 shall contain the name, nationality, address of the principal place of business, addresses of branch offices, if any, the qualifications and the date or registration of every registered patent agent.

(2) Where the register of patent agents is in computer floppies, diskettes or any other electronic form, it shall be maintained and accessed only by the person who is duly authorised by the Controller and no entry or alteration of any entry or rectification of any entry in the said register shall be made by any person who is not so authorised by the Controller.

Payment of fees (Rule 115)

The continuance of a person's name in the register of patent agents shall be subject to the payment of the fees specified therefore in the First Schedule.

Removal of a name from the register of patent agents (Rule 116)

(1) The Controller may delete from the register of patent agents, the name of any patent agent—

a. from whom a request has been received tb that effect; or

b. when he is dead; or

c. when the Controller has removed the name of a person under sub-section (1) of section 130; or

d. if he has defaulted in the payment of fees specified in rule 115, by more than three months after they are due.

(2) The removal of the name of any person from the register of patent agents shall be notified in the Official Gazette and shall be, where relevant forthwith communicated to the person concerned.

Restoration of name of persons removed from the register of patent agents (Rule 117)

(1) An application for the restoration of the name of any person removed from the register of patent agents under sub-section (2) of section 130 shall be made in Form 24 within two months from the date of such removal.

(2) If the name of a person is restored to the register of patent agents, his name shall be continued therein for a period of one year from the date on which his last annual fee became due.

(3) The restoration of a name to the register of patent agents shall be notified by the Controller in the Official Gazette and communicated to the person concerned.

Alteration of names, etc., in the register of patent agents (Rule 118)

(1) A patent agent may apply for the alteration of his name, address of the principal place of business and branch offices, if any, or the qualifications entered in the register of patent agents. On receipt of such application and the fee specified therefor in the First Schedule, the Controller shall cause the necessary alterations to be made in the register of patent agents.

(2) Every alteration made in the register of patent agents shall be notified in the Official Gazette.

Refusal to recognise as patent agent (Rule 119)

If the Controller is of the opinion that any person should not be recognised as a patent agent in respect of any business under the Act as provided in sub-section (1) of section 131 thereof, he shall communicate his reasons to that person and direct him to show cause why he should not refuse to recognise him as such agent, within such time as he may allow. After considering the reply, if any, of that person and giving him an opportunity of being heard, the Controller may pass such orders as he may deem fit.

Publication of the names of patent agents, registered under the Act (Rule 120)

The names and addresses of persons registered as patent agents shall from time to time be published in the Official Gazette, and in such other manner as the Controller may deem fit.

Dispute Settlement Body

To settle the disputes between Members concerning the rights and obligations under the provisions of the Agreement of WTO, Multilateral Agreements and Plurilateral Agreements, the Dispute Settlement Body (DSB) is established. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorise suspension of concessions and obligations under the covered agreements.

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreement.

Consultation

Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations is made by another Member. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall reply to the request within 10 days and shall be enter into consultations in good faith within a period of no more than 30 days. If there is no proper response, then, the Member may proceed directly to request the establishment of a panel. All such requests for consultations shall be notified to the DSB 'and the relevant Councils and Committees by the Members which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. In the case of perishable goods, Members shall enter into consultations within a period of no more than 10 days. If the consultations have failed to settle the dispute within a period of 20 days, the complaining party may request the establishment of a panel. During the consultations, Members should give special attention to the particular problems and interests of developing country Members.

Good Offices, Conciliation and Mediation

Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. The proceedings shall be confidential and without prejudice to the rights of either party in any further proceedings. If the parties to a dispute agree procedures for good offices, conciliation or mediation may continue while the panel process proceeds. The

Director-General may, acting in an ex-officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Establishment of Panels

If the complaining party so requests, a panel shall be established at the latest at the DSB meeting. The request for the establishment of a panel shall be made in writing and provide a brief summary of the result of consultation process along with the summary of the legal basis of the complaint sufficient to present the problem clearly.

Panel shall be composed of well-qualified governmental or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member etc., Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of qualified persons. Panels shall be composed of three panelists unless the parties to the dispute agree within 10 days from the establishment of the panel, to a panel composed of five panelists. The Secretariat shall propose nominations for the panel to the parties to the dispute. They shall not oppose nominations. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, the Director-General in consultation with the Chairman of the DSB shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established.

The Panel should make an objective assessment of the matter before it. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. When the panel considers that it cannot issue its report within six months or within three months in case of urgency, it shall inform the DSB in writing of the reasons for the delay. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months.

Each panel shall have the right to seek information and technical advice from any individual or a body. Panel deliberations shall be confidential. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

After receiving the panel reports, the DSB circulate it among the parties and wait for 20 days for their reply. Members having objections to a panel report shall give written reasons to explain their objections for circulation atleast 10 days prior to the DSB meeting at which the panel report will be considered.

The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until the completion of that appeal.

Appellate Review

A Standing Appellate Body shall be established by the DSB. it shall hear appeals from panel cases. It shall be composed of 7 persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. The DSB shall appoint persons to serve on the Appellate Body for a 4 year term, and each person may be reappointed once. The Appellate Body shall comprise persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. Only parties to the dispute, not third parties, may appeal a panel report. As a general rule, the proceedings, shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal. In no case shall the proceedings exceed 90 days.

An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Working procedures shall be drawn

up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Member to express their views on an Appellate Body report.

There shall be no ex-party communications with the panel or Appellate Body concerning matters under consideration by the panel or the Appellate Body. When a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. Time-frame for DSB decision, as a general rule, shall not exceed 9 months where the panel report is not appealed, or 12 months where the report is appealed. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members. Particular, attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and ruling are not implemented within a reasonable period of time. Compensation is voluntary and, if granted, shall be consistent with the covered agreements. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of the least developed country Members.

Arbitration

Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern

issues that are clearly defined by both parties. Except as otherwise provided in their understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee or any relevant agreement where any Member may raise any point relating thereto. Non-violation Complaints of the type described in paragraph l(b) of Article XXIII of GATT 1994 and complaints of the type described in Paragraph l(c) of Article XXIII of GATT have been dealt separately (Art. 26).

Role of the Director-General

The Director-General of the WTO may, acting in an ex officio capacity, offer good offices, conciliation or mediation with a view to assisting Members to settle a dispute. Such an offer may normally be made during the consultation period, but good offices, conciliation or mediation may, with the agreement of the parties to the dispute, continue while the panel process proceeds. In a dispute settlement procedure involving a least-developed country Member, when a satisfactory solution has not been found during consultations, the Director-General will, upon request by a least-developed country Member, offer his or her good offices, conciliation or mediation in order to help the parties to the dispute, before a request for a panel is made. In providing such help, the Director-General may consult any source which he or she considers appropriate. For an example under GATT 1947, see: Japan - Measures Affecting the World Market for Copper Ores and Concentrates - Good Offices Report by the Director-General (BISD 36S/199).

The Director-General may also be requested, in certain circumstances, to appoint panel members. This is the case where, within 20 days after the date of the establishment of a panel, there has been no agreement among the parties on the composition of the panel. The Director-General can act only at the request of either party in the dispute. The Director-General must determine the composition

of the panel in consultation with the Chairmân of the DSB and the Chairmen of the relevant Councils or Committees, after consulting the parties to the dispute. He or she must appoint the panelists whom he or she considers most appropriate in accordance with the DSU and any other special or additional rules or procedures of the covered agreement(s) concerned in the dispute.

The Director-General may appoint an arbitrator in cases where it is necessary to determine the reasonable period of time for implementation or where a suspension of concessions or other obligations has been authorized by the DSB under Article 22 DSU and the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures to be followed when considering what concessions or other obligations to suspend were not respected. The appointment of an arbitrator under Article 22 by the Director-General is an alternative to arbitration by the original panel, which shall carry it out if its members are available. The Director-General may appoint as arbitrator an individual or a group. The Secretariat is to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat is required to make available a qualified legal expert from the WTO technical cooperation services to any developing country member which so requests. The appointed expert will assist the developing country Member. However, the expert must do so in such a way that the continued impartiality of the Secretariat is respected.

India Wins GSP case against EC at the WTO

A WTO dispute settlement panel established at India's request in January 2003 has upheld India's contention that the European Communities has violated its GATT/WTO obligations in granting tariff preferences to 12 countries under the "Drug Arrangements" window of its GSP scheme without extending these preferences to other developing countries. The Panel has also ruled that the EC has failed to demonstrate that the Drug Arrangements are justified under the Enabling Clause, which otherwise allows the developed countries to grant tariff preferences to developing countries without allowing the same advantage to developed countries. India would seek the adoption of the panel report at the earliest in accordance with the provisions of the Dispute Settlement Understanding. Disputing parties in the WTO have a right to appeal a decision of the panel to the Appellate Body. This WTO ruling is likely to provide some

relief to the Indian exporters to EC, particularly those in the apparel sector, who are otherwise disadvantaged by duty concessions to Pakistan under the Drug Arrangements.

India's dispute with EC had arisen primarily because EC included Pakistan as beneficiary country under its Special Tariff Arrangement for Combating Drug Production and Trafficking under its GSP Scheme for the years 2002-04; Such a scheme was in operation even in earlier years with beneficiaries being restricted to ANDEAN and Central American countries. While the scheme, in India's view was not compatible with WTO rules even then, it had not agitated the matter in WTO since it was not significantly affected. However, with the inclusion of Pakistan as a beneficiary country with effect from 1.1.2002, Indian exports were directly affected, since there are a number of export sectors such as clothing where the two countries are close competitors in the EC market. The sudden and significant (a 9.6% tariff preference for instance on certain apparel products) advantage granted to Pakistani products has disadvantaged a significant level of trade flowing from India to EC.

India invoked dispute settlement proceeding of the WTO in this case with extreme reluctance and after having exhausted all available avenues for a negotiated settlement with the EC. The matter was taken up repeatedly with the EC at various levels including at the ministerial level. Even after initiating the dispute under WTO's dispute settlement procedures in March 2002, India continued its effort in seeking a bilateral solution to the problem with EC. However at no stage did EC respond positively to India's concerns. India continued these efforts even after the panel proceedings were at an advanced stage. During the panel proceedings India also clarified that while it did not dispute EC's right to give financial assistance to individual developing countries facing problems relating to drug production and trafficking, this could not be done at the expense of other developing countries facing different but equally pressing needs. India also urged EC to obtain a WTO waiver for these arrangements through prescribed procedures under the WTO Agreement. Certain other beneficiaries of the Drug Arrangements implored EC to seek a waiver. However, EC insisted on continuing the dispute.

The WTO panel has vindicated India's stand that the tariff preference under the Drug Arrangements are not given unconditionally to all developing

countries. The panel was not convinced by EC's contention that the Drug Arrangements are justified under the Enabling Clause. The Panel found that EC's Drug Arrangement, as GSP scheme, do not provide identical tariff preferences to all developing countries and that the differentiation is neither for the purpose of special treatment to the least-developed countries, nor in the context of the implementation of a priori measures.

The panel has recommended that the Dispute Settlement Body requests the EC to bring its measure into conformity with its obligations under GATT. Indian exporters to the EC have suffered considerable loss on account of the 10% tariff concessions available to exports from Pakistan of similar products. They can now hope to obtain some succour after the EC implements the findings of the panel in this dispute.

Review Questions

1. Expand TRIPS. State the properties of IPR.
2. Explain the various forms of IPR.
3. What are the basic principles governing TRIPs.
4. What is Dispute Settlement System ?
5. Explain the elements of DSS.
6. Discuss the rules and procedural formalities governing dispute settlement system.
7. Explain the efforts taken by Government of India to safeguard Patents and copy rights.

UNIT -5

TRADE RELATED INVESTMENT MEASURES

Trade Related Investment Measures (TRIMs) foreclose governmental efforts to force a degree of indigenization and domestic linkages on foreign producers who are provided a freer access to the developing countries' markets through such statutory changes. This would result in increase the access of the "North" in the "South" markets and increase the dependence of the South on the MNEs. India feels that the existing Bilateral Investment Treaty (BIT)/ Bilateral Investment Protection Agreement (BIPA) under the domestic laws are sufficient to take care of both the investors and the host country. Multilateral rules also do not guarantee any increase in investment to developing countries and empirically FDI in the South & South East Asian economies has grown multifold in the last decade, based on bilateral treaties. Besides. India's SMEs (small and Marginal Enterprises) which constitute about 40% of our industrial production will be a major casualty once this clause becomes operative, also affecting the employment potential of our industrial sector.

On the other hand, scheduled removal of quantitative restrictions on imports in April 2001 has created a situation where foreign producers, irrespective of size, are able to bring in products (subjects to tariff protection) but Indian producers including existing small scale producers, are not to compete with imports. Reservation in India covers some of the sectors where we have the maximum export potential, i.e. Leather products, toys and garments. Once this regime is dismantled in 2005, our exporters will have to compete freely with exporters in other countries. The impending situation may require a reservation policy for only select products in which we have a strong export potential.

Agreement on Trade-Related Investment Measures

The preamble to the agreement refers to the *Punfa del este* declaration wherein it is desired that negotiations should elaborate further provisions that may be necessary to avoid the trade restrictive and distorting effects of investment measures. It also refers to the need to promote the expansion and progressive liberalisation of world trade and to facilitate investment across the

international frontiers so as to increase the economic growth of all trading partners. The TRIMS agreement that ultimately emerged was not very ambitious, basically prohibiting measures that are inconsistent with the GATT national treatment principle (Art III) and the ban on the use of quantitative restrictions (Art XI). The focus of the agreement is on policies that imply discrimination against imports by creating incentives (additional to tariffs imposed at the border) to source domestic sources of supply. The agreement prohibits local content, trade balancing, foreign exchange - balancing and domestic sales requirements, requiring that all policies in conformity with the agreement be notified and eliminated.

Until the Uruguay Round, foreign investment was not concern to GATT. It was entirely the subject of national legislation occasionally covered by bilateral treaties. But it is desired by the Members to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition. Taking into account the particular trade, development and financial needs of developing country' Members, particularly those of the least developed country Members, agreed the Agreement of Trade-Related Investment Measures (TRIMS). This Agreement applies to investment measures related to trade in goods only (Art. 1)

Agreement on TRIMS and India

The proposals of Agreement on TRIMS are narrow in scope. It suggests that the Member country should extend national treatment. In fact, there are no new 'obligations. The export obligations practice adopted by the developing countries are not touched. Under the agreement India can continue to deploy measures such as import balancing requirements on the grounds of balance of payments difficulties. There is no implicit or explicit reference to obligation regarding entry on quantities of foreign direct investment. The waiver provided in TRIMS are adequate. On balance the proposal meets India's demand more than halfway. The GATT rules are not restricting the freedom of developing countries to frame and implement economic policy as per their requirements.

The TRIMS agreement prevents the Indian government from ensuring that foreign investment promotes national objectives or encourages domestic industry. India will no longer have the power to prevent multinationals from merely extracting resources from India and dumping imported goods in the domestic market by requiring them to use locally produced goods as production inputs or limiting imports of an enterprise to an amount related to its exports. India will be prohibited from protecting its national interests despite the fact that foreign investment has historically increased imports and reduced exports.

The TRIMS agreement prevents any discriminatory investment measures which favour goods produced by Indian companies over imports. However, Indian companies will be unable to complete on a completely equal basis with transnational corporations due to the great disparities in financial and technological power. The future will be that foreign companies will take over control of most of the Indian market and deprive Indian companies of a fair opportunity to engage in trade.

National Treatment and Quantitative Restrictions

The TRIMS requires extension of the principles of national treatment and elimination of quantitative restrictions in the Articles III or Article XI of the GATT, 1994 to the area of investment measures. National treatment means that a country may not regulate foreign investment so as to confer an advantage on locally produced goods or to disadvantage imports. The illustrative examples of prohibited TRIMS are the requirement that an enterprise use locally made inputs in production or limitations on imports related to the value or quantity of exports of locally produced

Second, the TRIMS agreement prevents countries from regulating investment in a manner that restricts the quantity of imports or exports by an enterprise.

Illustrative examples of prohibited TRIMS are:

1. the limitations on imports to an amount related to the volume or value of locally produced goods that are exported;

2. limitation on imports in an amount related to the foreign exchange attributable to an enterprise; and

3. limitations on exports by an enterprise in an amount related to the volume or value of its local production. (Annex para 2). This requirement is subject to exemptions based on balance of payments considerations.

All exceptions under GATT, 1994 shall apply, as appropriate to the provisions of the TRIMS..

Article 4 provides that a developing country member may deviate temporarily from the above provisions (requirements) to the extent that they can do under the relevant provisions of the GATT; (i.e.) in such a manner as Article XVIII of the GATT 1994, the Understanding on the balance of payments provisions of the GATT 1994 and the 1979 Declaration on Trade measures taken for balance of payments purposes permit the member to deviate from the provisions of Articles III and XI of the GATT 1994.

Article 5 requires members to notify the Council for trade in goods, within ninety days of the entry into force of the agreement establishing the W.T.O., of all trade related investment measures that are inconsistent with this agreement. Each member shall eliminate all such inconsistent measures within two years. In the case of a developing country, it is five years. In the case of a developing country, the Council for trade in goods may extend the time. Any new investment measure, in the transition period, is allowed in cases of 1) where the products of such investment are like products of an established enterprise, and 2) where it is necessary to avoid distorting the conditions of competition between the new investment and the established enterprises. These measures shall be notified to the council for trade in goods. But these also are required to be terminated within the period laid down earlier.

Transparency

Members reaffirm, with respect to TRIMs, their commitment to obligations on transparency. Each Member shall notify the Secretariat of the publications in which TRIMs may be found, including those applied by regional

and local governments and authorities within their territories. No Member is required to disclose information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the interests of particular enterprises, public or private.

Committee on Trade-Related Investment Measures

A Committee on Trade-Related Investment Measures is established and shall be open to all Members. The Committee shall elect its own Chairman and Vice-Chairman, and shall meet not less than once a year and otherwise at the request of any Member. The Committee shall carry responsibilities assigned to it by the Council for Trade in Goods and shall afford Members the opportunity to consult on any matters relating to the operation and implementation of this Agreement. The Committee shall monitor the operation and implementation of this Agreement and shall report thereon annually to the Council for Trade in Goods.

Article 8 provides for consultation and dispute settlement. The provisions of Article XXII and XXIII of the *GATT* 1994 as elaborated and applied by the understanding on rules and procedures governing the settlement of disputes, shall apply to all such consultations and disputes under the agreement.

Article 9 calls for review of the operation of the agreement by the Council for trade in goods within five years after the date of entry into force of the agreement establishing the W.T.O.

Developing Country Members

A developing country Member shall be free to deviate temporarily from the provisions of the national treatment, and the Understanding on the Balance of Payments Provisions of GATT. 1994, and the Declaration of Trade Measures Taken for Balance of Payments Purposes adopted on 28 November 1979 permit the Member to deviate from the provisions of Articles III and XI of GATT, 1994.

In regard to TRIMs, attention is drawn to the following :

a) there is no requirement in the proposals to give a preferential treatment to foreign investors. Such investors would be subject to the same restrictions as other investors in regard to imports.

b) government's ability to impose export obligation on foreign or domestic investors remains unimpaired.

c) There is nothing in the TRIMs Agreement to limit the application of investment measures such as limitation of access to foreign investors, ceiling on foreign equity in domestic companies, etc., furthermore, there is no requirement to give a more advantageous treatment of foreign investors in the application of domestic laws.

Notification and Transitional Arrangements

Members, within 90 days of the date of entry into force of the WTO Agreement, shall notify the council for Trade in Goods of all TRIMS they are applying that are not in conformity with the provisions of this Agreements. Such TRIMS of general or specific application shall be notified, along with their principal features.

Each Member shall eliminate all notified TRIMS within two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of developing country Members, and within seven years in the case of a least-developed country Member, On request, the Council for Trade in Goods may extend the transition period for the elimination of TRIMS for a developing and least - developed country Members, which demonstrates particular difficulties in implementing the provisions of this Agreement. During the transition period, a Member shall not modify the terms of any TRIMS which it notified from those prevailing at the date of entry into force of the WTO Agreement so as to increase the degree of inconsistency. TRIMS introduced less than 180 days before the date of entry into force of the WTO Agreement shall not benefit from the transitional arrangements.

Any TRIM so applied to a new investment shall be notified to the Council for Trade in Goods. The terms of such a TRIM shall be equivalent in their competitive effect to those applicable to the established enterprises, and it shall be terminated at the same time.

Multilateral agreement on investment

Some developed countries, led by the European Union are attempting to introduce a Multilateral Investment Agreement at WTO. At another level, it is being negotiated by the OECD member countries, which OECD later plans to open for other countries to join. The acronyms shift from MIA to MAI, but the two models are basically the same.

Salient features of Multilateral Agreement on Investment

The purpose of Multilateral Agreement is to safeguard and advance the rights of international investors vis-à-vis host governments and countries. Following are the features of MAI

a. The right of entry and establishment of foreign companies to enter and establish themselves in almost all sectors of a country. This means that a government will lose its authority to determine which foreign investor it would allow or disallow from entering the country.

b. The right to full equity ownership. This means that a government would not be allowed to require foreign companies to allow a portion of their equity to be locally owned or form joint ventures with local firms or the state.

c. Removal of the many regulations and conditions now imposed on foreign companies by host government (e.g. movement of personnel, performance requirements, allowing foreign firms to take part in privatization projects).

d. Protection of foreign investors in regard to discrimination, intellectual property, expropriation. Compensation, transfer of

funds and taxation, and full compensation if asked to close or taken over.

e. Establish a dispute settlement system to make the agreement legally binding and enforceable.

Review Questions

1. Explain TRIMS.
2. Describe the scope of TRIMS
3. How are disputes settled under TRIMS?

UNIT – 6

EMERGING ISSUES IN WTO

International Trade and Competition

Competition has long been acknowledged as an important force bringing about economic development and growth. Competition can also act as a substitute for other institutions. There is evidence that competition can substitute for an effective bankruptcy system because it exerts pressures on inefficient firms to go into liquidation. A number of studies have found a positive relationship between competition, firms adjust operations to raise efficiency and thus maintain profitability. and less efficient firms exit the industry. The exit of these firms frees up resources , which can then be used by more efficient firms.

International trade promotes competition in markets . openness to international trade also helps exert pressure on governments to reform those domestic product and factor market institutions that undermine the ability of firms to respond to competitive pressures from abroad. But the effect of this source of competition is mostly limited to tradable goods. Governments worldwide need to build more effective institutions to address aspects of international trade regime that can undermine competition. At the national level this includes making further progress in liberlising services as well as goods and for industrial countries in providing access for developing country exports. At the international level it includes reducing compliance and certification costs of trade-related product standards and taking advantage of the flexibility allowed in the agreement on Trade-Related Intellectual Property Rights (TRIPs) to allow developing countries to maximize benefits.

Exposure to international markets plays a central role in promoting competition in domestic markets. Imports directly introduce international competition pressures to domestic markets. This pressure is also introduced indirectly through exports, since domestic firms have to compete in the global marketplace.

There is a sizeable body of empirical work that provides evidence that trade liberalization increases competition and consequently , efficiency and productivity growth. Case studies show that even in a large industrial country such as the united states, international competition raises productivity.

The world development report, 2002 pointed out that international trade is particularly useful in promoting competitive markets in developing countries, where there are information difficulties, inadequate contract enforcement and human capital constraints. These circumstances to promote competition that depends strictly on rules, such as international trade, compared with an instrument like competition law which requires investigations and adjudication. International trade also creates pressures for governments institutional barriers to competition in the domestic trade because these barriers undermine the domestic economy's ability to respond to foreign competition. India provides a good example for the role of international trade in liberalizing domestic regulations on entry.

All international standards are not appropriate for developing countries. Without attention to country circumstances, some standards , such as those for intellectual property rights, can even have adverse distributional consequences. Moreover, complementary institutional forums human capital to enforce these systems do not exit in many countries. In international forums human capital constraints can prevent developing country's policy makers from engaging effectively in negotiations. These are the areas that need attention if future development of international standards is to reflect developing country priorities and promote competition.

In this context the WTO's pioneering work in analyzing the interaction between trade and competition policy in dialogue with the business community should continue in order to advance understanding of the complex issue involved and their ramifications . the setting up of global competition initiative an independent forum to promote consultation, dialogue and consensus building among national competition authorities on global competition authorities on global competition problems is a welcome step.

Interface between Intellectual Property Rights and Competition

The World Development Report, 2002 pointed out that in developing countries competition laws and policies in general do not address monopoly abuse of Intellectual Property Rights. A survey of competition laws in developing countries indicated that only 5 out of 33 countries prohibit IPR agreements that restrict competition, compared with 9 out of 21 industrial countries. The lack of capacity to enforce competition laws also constrains the ability to control restrictive practices. Unless developing countries rapidly establish adequate competition frameworks and regulatory institutions that also address monopoly abuse of IPRs, it is possible that increasing IPR protection could result in welfare losses from monopoly behaviour. In this context, it is worth mentioning that the Competition Act, 2002 takes care of intellectual property rights.

It is therefore, amply clear that Intellectual Property Law and competition law are both necessary for the efficient operation of the marketplace. Intellectual property laws provide property rights comparable to those of other kinds of private property, thereby providing incentives for owners to invest in creating and developing intellectual property and encouraging the efficient use and dissemination of the property within the marketplace.

Similarly, competition law is intended to enhance consumer welfare by promoting competitive markets and consumer choice. Intellectual property laws are also intended to enhance consumer welfare, as businesses are encouraged to innovate and invest in new technologies leading to improved products and lower prices. Brands enable consumers to choose the products they value, which encourages competition among brand owners. The promotion of a competitive marketplace through the application of competition law is thus consistent with the objectives underlying intellectual property law.

Accordingly, competition and intellectual property law are closely linked, as intellectual property law rewards innovation by granting exclusive rights, the competition law ensures that companies do not restrict freedom to compete or exploit market power with anti-competitive consequences. However, from the traditional point of view, the situation may be different for those companies whose intellectual property assets give them a strong position in a given market

to the extent enabling them to restrict the competition in that market. But it is now accepted that, since they do not necessarily, or even very often, create legal or economic monopolies, intellectual property laws do not necessarily clash with competition laws because the goods and services produced using intellectual property compete in the marketplace with other closely-substitutable goods and services.

In most instances, competition and intellectual property laws can be seen as complementary, seeking to promote innovation to the benefit of consumers and the economy. However, in situations where intellectual property owners are in a position to exert substantial market power or to engage in anti-competitive conduct, the conflict between the two becomes apparent. In these instances, owners of intellectual property rights seek to extend the scope of the right beyond that intended by the intellectual property Law. The key issue in such situations therefore, is to find out an appropriate balance between intellectual property and competition laws.

The challenge for competition authorities in such situations is, how to minimize the anti-competitive effects of Intellectual Property Rights while respecting their existence and the societal goals they are meant to promote.

In this context, it is important to mention that most competition laws contain exemptions or exceptions designed to ensure that they do not negate right explicitly granted by respective intellectual property laws. However, the fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention. Competition law is in particular applicable to agreements whereby the owner of intellectual property rights licenses another undertaking to exploit intellectual property rights.

In the increasingly knowledge-based economy, it is almost certain that competition authorities confront issues involving Intellectual Property Rights, and eventually have to take action to check the abuse of those rights. Determining the scope of IPRs is usually not a task assigned to competition authorities, but competition authorities certainly play an important role in determining-the extent of market power associated with IPRs, ensuring that such power is not excessively compounded or used as leverage and extended to other

unrelated markets. Hence, competition law has a role in limiting monopolistic abuses related to the exercise of IPRs, by preventing companies holding competing intellectual property rights from engaging in anti- competitive practices. The Competition Authority applies the general provisions of the Competition Law when IP rights form the basis of arrangements between independent entities, whether in the form of a transfer, licensing arrangement or agreement to use or enforce IP rights

Competition Issues in Intellectual Property Licensing

Typically intellectual property is one of the components in a production process and derives value from its combination with complementary factors. This integration can lead to more efficient exploitation of the intellectual property, benefiting consumers through reduction of costs and introduction of new products. Such arrangements also increase the value of intellectual property to developers of technology. By potentially increasing the expected returns from intellectual property, licensing increases the incentive for its creation and thus promotes greater investment in research and development.

In majority of cases, licensing is pro- competitive because it facilitates the broader use of a valuable intellectual property right by third parties. If an intellectual property owner licenses, 'transfers or sells the IP to a company or a group of companies that would have been actual or potential competitors without the arrangement, and if this arrangement creates, enhances or maintains market power, the competition authorities may seek to challenge the arrangement under the appropriate provisions of the Competition Law. However, in assessing whether a particular licensing arrangement involves competition issue, the competition authorities the world over examine whether the terms of the arrangement serve to create, enhance or maintain the market power of either the licensor or the licensee and thereby reduce competition substantially or unduly relative to that which would have likely existed in the absence of such arrangement.

Thus, Licensing arrangements raise concerns under the competition laws if they are likely to affect adversely the prices, quantities, qualities, or varieties of goods and services either currently or potentially available. Licensing agreements which, directly or indirectly, restrict the ability or incentive of any of

the parties, to carry out independent R&D, may also have anti-competitive effects, because such agreements can reduce potential competition in the technology and innovation markets, which would have existed in the absence of the agreement.

Restrictive Practices under intellectual property licensing

The term restrictive practice signifies non- governmental measures used by companies to strengthen their position in a given market. In the context of IPRs, these practices can hamper or distort competition in given market. Competition and anti-trust laws deal with such business practices and prohibit them when it is established that they have the effect of distorting or preventing competition in a given market.

The concept of unfair competition has been also recognised under the Paris Convention for the Protection of Industrial property which comprises not only infringement of industrial property but also all other acts which adversely affect the business relations of a person. The provisions of the Paris Convention contain a broad stipulation that any act of competition contrary to honest practices in industrial and commercial matters constitutes an act of unfair competition. These provisions affirm the foundation of fair competition as being honest practices or good morals and set out three kinds of acts which are deemed typically unlawful in international trade and therefore, must be prohibited.

UNCTAD Code of Conduct on Transfer of Technology under Chapter IV has also recognised some practices as restrictive practices. In India, the Monopolies and Restrictive Trade Practices Act, 1969, the Patents Act, 1970 and Competition Act, 2002 prohibit the use of .restrictive practices in business agreements.

Labour Standards

The developed Bloc is also keen to have Labour Standards foisted as they argue that many jobs are lost in industrial countries because of "unfair" competition from developing countries which have lower prices as workers there are poorly compensated and have few or no social benefits. This raises another

kind of non- tariff barrier for the developing bloc only to produce markets for the products of the developed economies.

Negotiations in respect of investment, competition policy, government procurement and trade facilitation, are to begin after the Vth Ministerial in 2003 while that on issues related to environment were included from the Doha Ministerial.

Trade and Labour Standards

The social clause is an international trade arrangement which renders it feasible to link imports in conformity to labour standards. This arrangement could provide for restriction or prohibition of imports of products from countries, industries or enterprises where there is no compliance with stipulated labour standards. It could also provide for preferential imports of products from where there is compliance with stipulated labour standards.

GATT and Labour Standards

Though there is International Labour Organisation (ILO) to deal with labour issues, WTO/GATT is considered as the appropriate institutional framework for incorporating labour standards into the multilateral trade system, as a means of protection against human rights violations in the work place and guarantee of fair competition.

The preamble to the GATT states that the participating countries are entering into the accord :

"Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand developing the full use of the resources of the world and expanding the production and exchange of goods."

Labour standards (Social clause) is not new to the GATT. Article XX(9)(c) in the GATT Agreement, 1948 (Original post-war agreement) which provides for exclusion of goods made by prison labour has been cited to argue

that labour standards are already covered in the GATT. The satisfactory solution could be found by amending Article XX(9)(c) to include a ban on child labour and forced labour and the right to trade union freedom and collective bargaining.

From the inception of the GATT with 1948 Havana Charter, the idea of introducing the principle of maintaining reasonable labour standards in international trade negotiations was raised. However, all the previous attempts to initiate discussions on a link between trade and human rights failed.

Dr. S.R. Myneni in his book, World Trade Organisation, Asia Law Book House.(2nd Edition), Hyderabad has elaborately put forth arguments for and against the inclusion of labour standards in GATT / WTO.

Arguments for the Inclusion of Labour Standards in the GATT/WTO

In an increasingly competitive world trade market, governments should agree to a minimum floor level of labour standards so as to ensure that social conditions improve as trade expands. The 'trickle-down' theory of trade policy does not work. There are no automatic mechanism by which increased exports lead to improved wages and conditions. Increased exports do provide the resources for improvements but only trade unions through collective bargaining or governments through adequately enforced labour laws can ensure that increased trade does really lead to higher standards of living for all workers.

It is suggested to include social clause in GATT due to two main reasons: (1) GATT is the most important organ for regulating world trade with over 125 members; (2) GATT is based on the principle of non-discrimination, so if you include a social clause in GATT it holds good for every member, whether it is a rich one or a poor one. The following arguments are put forth in support of inclusion of labour standards (social clause) in GATT:

- The Social Clause would enable GATT to move closer to its original objectives of increasing the standard of living and full employment;

- Labour standards linked to international trade agreements could set minimum levels in the current competitive climate. This would prevent increasing competition in reducing the labour standards;

- The incorporation of labour standards will halt the trend towards protectionism that stems from economic problem like unemployment; and
- Labour standards also serve to regulate production by multinational companies in the developing countries which often profit from the exploitation of labour.

In addition to the above arguments, the advocates of the labour standards justify the trade linkage on the following grounds also:

(i) the need for social progress keeping pace with economic progress
(ii) the 'solidarity 'argument' (that the industrial countries should prefer adoption of universal minimum labour standards, failing which they may be seen as collaborating in the exploitation of workers in developing countries);
(iii) pre-emption of unilateral protectionism in trade; and
(iv) the concept of 'fair trade' involving 'harmonisation' 'level playing field' and pre-emption of 'races to the bottom' - all of which mean equalisation of regulatory labour standards.

Arguments Against the Inclusion of Labour Standards in GATT/WTO

A substantial number of developing countries have taken strong position against the inclusion of social clause i.e. labour standards in GATT. They put forth the following arguments:

(1) The competitive position of developing countries will be impaired by premature introduction of labour standards because it removes one of their few advantages compared with the developed countries namely, the availability of a large low-paid labour force;

(2) Western Countries would have a new *alibi* for applying covert forms of protectionism - protectionism with a human face, whereby they could transfer their economic problems to developing countries.

(3) There is no expertise within GATT in the field of labour. Labour standards are the work of the International Labour Organisation (ILO).

(4) The incorporation of labour standards into international treaties may result in a loss of sovereignty. The pressure involved in the imposition of Labour Standards, can deteriorate into interference in domestic affairs.

(5) Trade sanctions above cannot change the conditions which lead to child labour.

The GATT Ministerial Meeting with which the Uruguay Round ended has left the issue of the social clause open as the Members failed to gain consensus. As the GATT has taken the form of the WTO, it is left to the Members of WTO to negotiate the practical implementation procedures of labour standards and be set out in a code annexed to GATT. The US and the Western Countries have already started their attempts. The developing countries continued to oppose the inclusion of labour standards in World Trade Organisation.

Government Procurement

WTO members are exempted from the basic GATS obligations in purchasing services of their own use. However, the same GATS provision that specifies Articles II (MFN rule), XVI (market access commitments) and XVII (national treatment) rules are inapplicable to such purchases. The negotiations on government procurement are expected to lead to commitments to open up some government purchases to foreign service suppliers.

GATS Exceptions to General Obligations

The GATS provision on general and security exceptions are perhaps the closest of all to their GATT equivalents. This reflects the fact that overriding considerations which are recognised as allowing a country to ignore specific international obligations will apply as strongly to one aspect of its trade as to another.

General Exceptions

There are exceptions in Article XIV of GATS, similar to those in Article XX of GATT, that allow countries to adopt measures inconsistent with an obligation as long as measures are not disguised restrictions on trade. To begin with the Article permits the adoption or enforcement of measures necessary to protect public morals, to maintain public order, or to protect human, animal or plant life or health. A decision on Trade in Services and the Environment has changed a new committee to examine and report on the relationship between services trade and environment, including the issue of sustainable development, in order to determine whether these exceptions should be modified to take account of measures necessary to protect the environment.

If environmental hazards increasingly fail to respect national borders, the other general exceptions begin to recognise the challenges to national regulatory competence of physically mobile or electronically dematerialised economic flows. A legitimate regulatory objective concerns assurance of the quality of services supplied. The GATS exceptions allow measures that are necessary to ensure compliance with rules or regulations relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts.

This exception also extends to the protection of the privacy of the individuals in relation to the processing and dissemination of personal data and also the protection of confidentiality of individual records and accounts. The freer flow of services internationally enhances opportunities to engage in tax avoidance. GATS Article XIV(d) allows measures inconsistent with the national treatment which is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members. In acknowledging examples of the measures which members have taken to protect their tax bases, a footnote to this exception provides an insight into the complexity of the arrangements in the field. The footnote spells out a number of warp in which a country's taxation practices may treat foreigners differently from its own nationals. However, it must be appreciated that the exception only applies to the collection of taxes which are imposed on the services themselves or their suppliers. It does not acknowledge the broader role

of service suppliers such as professionals play in constructing tax avoidance schemes and the need to regulate services supply on this basis.

The General Exceptions under Article XIV also covers measures inconsistent with the MPN obligation, provided the differences in treatment are the result of an agreement on the avoidance of double taxation.[4] The integrity of double taxation agreements is also protected by a later provision that prevents national treatment objections to a measure that falls within the scope of an international agreement relating to the avoidance of double taxation. But the double taxation agreements were forged largely to obviate the conflicting requirements which were experienced by those operating in more than one country. It is clear that globalisation is intensifying tax competition between countries.

Like the exceptions of Article XX of the GATT, the exceptions of Article XIV of the GATS reflect policy objectives that WTO members recognise as legitimate and that, upon meeting certain conditions, can be implemented without giving rise to a breach of the Agreement. One must first determine whether the measure at stake falls within the ambit of paragraphs (a) to (e) of Article XIV. In the affirmative, then one must determine whether the measure also meets the requirements of the Chapeau, that is, whether it is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services. It must be emphasised here that under the Chapeau, what is at stake is not so much the questioned measure or its specific content, but rather the manner in which it is applied. The purpose and object of the Chapeau is essentially to prevent the abuse of the specific exceptions set out in paragraphs (a) to (e).

Security Exceptions

The security exceptions under the GATS are virtually identical with those of the GATT. Article XIV bis allows a member to withhold information or take actions that are necessary to its essential security interests. It allows a WTO member from taking any actions which it considers necessary for the protection of essential security interests relating to the supply of services for the purposes

of military establishment, relating to fissionable and fusionable materials and also action taken in the time of war or other emergency in international relations. It also allows a WTO member to take appropriate action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security. The Council for Trade in Services is the body to which all WTO members are obliged to inform of the actions taken by them under security exceptions.

Movement of natural persons supplying services under GATS

Along with Annex relating to Article II Exemptions, the Annex dealing with Movement of Natural Persons Supplying Services under the GATS is most important and permanent annexes. GATS constitutes eight annexes all adopted on the same day on which GATS was signed. Annex on Movement of Natural Persons Supplying Services under the Agreement is covered by Mode 4. Under this Annex two categories of measures are covered ; (a) those affecting service suppliers of a member of the GATS, i.e., self-employed suppliers who obtain their remuneration directly from customers ; and (b) those affecting the natural persons of a member who are employed by a service supplier or a member in respect of the supply of service. The Annex explicitly declares that it will not apply to measures affecting individuals seeking access to the labour market of a member country, or to measures regarding citizenship, residence, or employment on a permanent basis.

There are at least three dimensions to the movement of natural persons from one country to another due to economic reasons, the period of stay, the levels of skills and the nature of the contract. Each dimension has some variation. An individual can move for a single day or migrate permanently, can possess no professional skills or be the master of a particular field, move as an independent professional or be transferred from headquarters to a local branch. The legal and economic implications of each type of movements varies. The Annex further states that members may negotiate specific commitments that apply to the movement of all categories of natural persons supplying services under the Agreement. It goes on to say that natural persons who are covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment. But within their schedules, many countries are to apply limitations, both across-the-board and sector-specific, to the entry of

natural persons into their territory. Horizontal entries often merely listed the exceptions to general controls on entry; sector-specific entries declared that thus mode of supply is unbound.

The Annex on movement of Natural Persons supplying services under the Agreement recognises the member's interest in screening those who enter its territory. In this regard, the Annex declares that the Agreement is not to prevent a member from applying measures to regulate the entry of natural persons into its territory, or their temporary stay in it. This includes those measures necessary to protect the integrity of its borders, and to ensure the orderly movement of natural persons across them. This provisions is subject to a proviso that such measures are not to be applied in such a manner as to nullify for impair the benefits accruing to any member under the terms of a specific commitment. However, a footnote attached to the Annex make it clear that the sole factor for requiring a visa for natural persons of certain members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitments.

The Annex on Movement of Natural Persons Supplying Services clearly seeks to keep the issue of migration out of the negotiations by stating that the Agreement will not apply to measures affecting natural persons seeking access to employment market of a member. Nor it will apply to measures regarding citizenship, residence or employment on a permanent basis. The Annex is said to apply only to measures affecting natural persons who are service suppliers of a member, and natural persons of member who are employed by a service supplier of a member, in respect of the supply of a service. Developing countries are not happy over the exclusion of this issue from GATS. These countries which also includes India wont to keep this issue on the agenda as a counter to the calls by developed countries such as United States and ED countries for a social clause. The social clause asks commitment to core labour standards at home as the quid pro quo for market access abroad. The core labour standards are contentions where manufactured goods are traded, they can also become a factor when services itself are tradeable. Where service workers such as construction workers, travel to the site of the consumers, an issue may be whether home or host labour standards are to apply. The migration issue also so provides a counterweight to the negotiations over financial and telecommunication services.

Despite the dramatic development in technologies for electronic delivery still natural persons supplying services remain important for a range of services. Even in the field of software industry the movement of service supplying personnel remains crucial despite the decline in onshore services. Still nearly half of Indian software exports are supplied through the temporary movement of programmers to the client's site overseas. Further, with the increase in the average levels of training and education, the industrial countries will feel the increasing scarcity of service suppliers, in particular of moderately and less skilled labour. Keeping in mind the demand of caring occupations, personal services and a range of professional services the demand for these service suppliers will increase further around the world.

Trade and environment

Environmental concerns have long been the subject of international interest on account of increasing population. Over the past 20 years the content and quality of the discourse on the environment have been completely transformed. The authoritative scientific evidence available on environmental problems commands the attention of government and the public alike. Climatic change, the loss of biodiversity and other related issues have been recognized as problems that the community of nations must take on collectively. If they are unattended they will worsen the planet. Many of these issues are closely linked to the potential success of development efforts in poor countries and the growing awareness of these linkages is part of the continuing shift in the development perspective.

The GATT Council in 1971 decided to constitute a group on Environmental Measures and International Trade. Simultaneouly, a large number of Multilateral Environmental Agreements came into existence in view of the growing environmental consciousness in many developed and developing countries.These agreements include provisions that can affect trade as for example they prohibit trade in certain circumstances . The notable agreements include—The Montreal Protocol to phase out the use of Ozone Depletion Substances:the biodiversity Convention for conservation of Biological Diversity: the convention on international trade in endangered species: The Basel Convention on the Transboundry Movement of Hazardous Wastes; and the London Guidelines on the Exchange of Information on Banned or Severely Restricted Chemicals.

The Ministerial Declaration on Trade and Environment ensures that linkage between trade policies, environmental policies and sustainable development will be taken up as a priority within the WTO. Following the declaration a Committee on Trade and Environment was constituted to bring issues relating to environment and sustainable development into the main stream of WTO activities. The WTO committee on Trade and Environment has a broad base responsibility covering all areas of the multilateral trading system namely, goods, services and intellectual property. At the Fourth Ministerial Conference held at Doha, the member states with a view to enhancing the mutual supportiveness of trade and environment, agreed to negotiations, without prejudging their outcome on:

(ii) the relationship between existing WTO rules and specific trade obligations set out in Multilateral environmental agreements. The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any member that is not a party to the MEA in question.

(iii) Procedures for regular information exchange between MEA Secretariats and the relevant WTO committees and the criteria for the granting of observer status;

(iv) The reduction or as appropriate elimination of tariff and non-tariff barriers to environmental goods and services.

According to Dr.S.K.Dixit, Deputy Director, ICSI, New Delhi, Doha declaration instruct the committee on Trade and Environment, in pursing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmenta measures on market access, especially in relation to developing countries, in particular the least developed among them and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development.

(ii) The relevant provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights and

(iii) Labelling requirements for environmental purposes

Environment Policy

The developed blocks have been trying to foist Environmental Standards on the internationally traded goods and services. By utilizing the cover of WTO, rich economies could succeeded in erecting a non-tariff barrier to the flow of multilateral trade in the guise of a link between environment & trade concerns. India feels that the current WTO rules are sufficient to care fir environment concerns and this agreement is only a disguise to further the cause of MNCs' trade whereas developing countries will not able to fully adhere to these norms.

Sectoral Impact of Trade Liberalization Scenario on India

It is said by the protagonists of multilateral trade liberalization that productive resources could get allocated more efficiently as compared to the pre-liberalization situation as India would specialize in the sectorswhere it has comparative advantage. It is expected that trade liberalization will stimulate the production of labour-intensive sectors in India. However, there can be transitional costs due to inter-sectoral movement of factors of production. Further, when firms get protection from foreign competition through tariff and non-tariff barriers, they take advantage of their market power by raising their prices and reducing their domestic sales. The results is that the protected firms tend to produce below their minimum-cost plant size. Trade liberalization may thus bring competitive pressures on the formerly protected firms and induce them to raise to consumers and improved allocation of resources, lower prices to consumers and business firms, and availability of more varieties to consumers and firms. A more open trade and investment-regime may also force a substantial restructuring in Indian industry in which industrial groups will have to shed flab and concentrate on their areas of core competence.

Inefficiently run units then are either closed it taken over by others who are able to run them efficiently. This has not happened so far because labour legislation makes it difficult to restructure loss-making units discouraging others from offering to run them. However, in contrast to the above arguments, while the liberalization taken place so far in India in the wake of WTO has proved to be important in promoting mid skill level software exports, it has not appeared to generate significant employment in export oriented, labour intensive manufacturing industries. This kind of a situation compares unfavorably to the

trade liberalization experiences of the east Asian economies in the 1980s and 1990s which emerged important global players in labour intensive manufacturing industries. The more recent experience of China has also shown the wide spread impact of liberalization, particularly after its admission to WTO, on its fast growing manufacturing base which is now world's fourth largest in terms of value of goods produced (2001) after U.S., Japan and Germany.

Review Questions

1. Discuss the emerging issues in WTO
2. Write short notes on
    a. Trade & Environment
    b. Trade & Competition Policy
3. Explain the arguments for the inclusion of labour standards in the WTO.
4. Discuss the arguments against the inclusion of labour standards in WTO.



MODEL QUESTION PAPER

WTO – CONSTITUTION AND OPERATION

Section A (5X8 = 40)
Answer any five Questions

1. Explain the principles of WTO Trading Systems.
2. What are the objectives and structure of WTO?
3. Explain agreement on subsidies and countervailing measures.
4. What is meant by agreement on anti-dumping?
5. State the Provisions applicable to automatic licensing procedures.
6. What is intellectual property? State the various forms of intellectual property rights.
7. How are TRIM disputes settled?
8. Explain the provisions pertaining to movement of natural persons.

Section B (4X15 = 60)
Answer any four Questions

9. Discuss the outcome/deliberations relating to various ministerial conferences.
10. Explain the various methods of valuation of goods under the Customs Act, 1962.
11. What is meant by GATS? Explain any 10 services that come under the purview of GATS.
12. What are the features of intellectual property? Explain the scope of TRIPS.
13. What is Dispute Settlement System? Explaining the rules and procedures governing DSS.
14. Discuss the emerging issues that deserve special attention under WTO.
15. Write short notes on :
    a. Trade and competition policy.
    b. Trade and environment.
    c. Trade and Technology.

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